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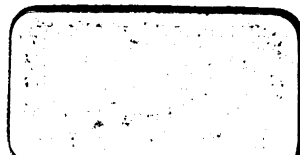
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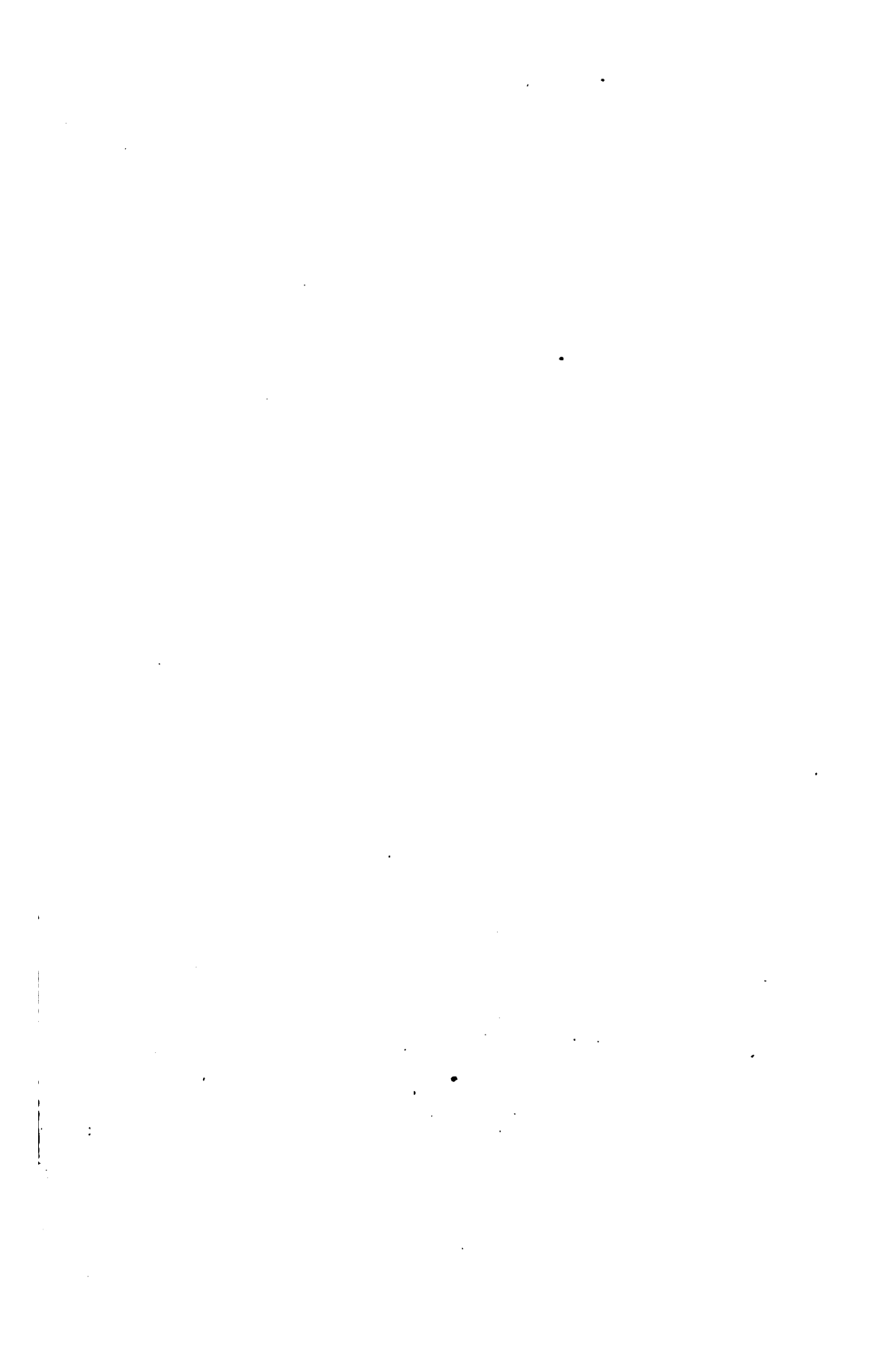
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A
TREATISE
ON
PAROCHIAL SETTLEMENTS.

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A
TREATISE
ON
PAROCHIAL SETTLEMENTS:
IN TWO PARTS.

1. ON THE LAW OF SETTLEMENT:
2. ON EVIDENCE RELATING TO SETTLEMENTS.

By EDWARD JOHN GAMBIER,
OF LINCOLN'S INN, BARRISTER AT LAW.

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If the party occupied for the benefit of the grantor, and not for his own, he had not the character of tenant.

There could be no occupation as a tenant of that which there was only a license to use in manufacturing.

A mere tenancy at will was sufficient to give a settlement.

No express contract was necessary.

An occupation by permission or consent, or even by mere indulgence, was sufficient.

Nor was it necessary that there should be any rent.

The tenement was to be of the yearly value of 10*l.*; that is, of the value of 10*l.* if let by the year.

Value a question of fact. The rent only evidence of the value.

The tenement might be let by the week or day.

The value was to be estimated at the time the party came to settle upon it ; that is, at the beginning of his lease, if for years ; at the beginning of any one year, if it was a lease from year to year.

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To be hired for a year at least, at a rent of 10*l.* at least ; and the hiring without fraud ;

The house or building to be held, and the land to be occupied, for a year ;

House, &c. might be underlet in part ;

The taker of land to occupy it solely and exclusively ;

The holding or occupation might be under different hirings, and need not have been for the same year as the hiring ;

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Buildings, as well as land, must be occupied ;

No part can be underlet ;

The holding to begin and end with the year for which the tenement is hired ;

Rent to be paid for the same year ;

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Of the rating :

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A party rated by mistake might gain a settlement.

So might one rated in a void rate.

Rating not confined to parochial taxes.

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A payment in law, sufficient.

A payment, afterwards refunded by a third party, sufficient.

Of the residence :

The party was to be resident in the parish for forty days after payment of the rate.

Of the change made by stat. 35 Geo. 3. c. 101.

Under stat. 3 W. and M. c. 11., any tenement was sufficient.

Under stat. 35 Geo. 3. c. 101., it must have been a tenement of the yearly value of 10*l.*

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CHAPTER VI.

Of Settlement by Estate.

Foundation of a settlement by estate.

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Definition of a settlement by estate.

The questions which may arise are—1. As to the estate, what it must be to give a settlement; 2. As to the title of the party; 3. As to his residence upon the estate.

Of the estate :

All estates, except those purchased for less than 30*l.*, will give a settlement; whether freehold or copyhold; provided the interest be an interest in *land*.

A rent out of a freehold is not sufficient, because it can give no right to live upon the freehold.

A right of common would probably be sufficient.

A reversion will give a settlement.

But not an advowson.

The estate may be legal or equitable; an estate in common, in co-parcenary, or a joint-estate.

Of legal estates :

A guardian in socage, a mortgagee in possession, an executor or administrator after probate, &c., and a husband in right of his wife, have all such estates as will give them a settlement. So has a party with a good title in ejectment; or one who has possessed uninterruptedly for somewhat less than twenty years; or one who has agreed to sell his estate, but continues to live upon it.

Of equitable estates :

The interest must be a clear equitable interest.

Whoever has a substantial beneficial interest may gain a settlement by means of it.

Instances of equitable estates :

Cestui que trust; sole next of kin before administration; a party, conveying to trustees, to pay a stated sum of money, and afterwards to re-convey; a party, to whom the money, arising from the sale of an estate by trustees, is to be paid, and who lives upon the estate until sold; a party, who, by the devisors will, is to have power to reside upon the estate during his life; have all clear equitable estates.

Of an interest which does not amount to an equitable interest :

A license to occupy, although it amount to a questionable claim in a Court of Equity, and though granted to one who advances part of the purchase-money, does not confer any estate.

Neither a parol agreement, accompanied by payment of part of the purchase-money;

- Nor even an agreement, according to the Statute of Frauds, with a like payment, gives the party an equitable estate.
- This doctrine (that a purchaser, who has contracted according to the Statute of Frauds, has no equitable estate) seems to be at variance with decided cases in Chancery, where he has been always deemed to have, from the time of making the agreement, an estate which he may sell, devise, &c.; and this seems to be substantially an estate, and not a mere right.
- In a devise to trustees for the benefit of A., where it is the intention of the devisor that no interest should vest in A., A. cannot gain a settlement.
- A devise to trustees out of the rents, &c. to pay debts, and afterwards to pay the rents, &c. to A. for life, if the debts cannot be paid during the life of A., gives no interest to A.
- A conveyance to trustees to sell and pay mortgages, and to pay the surplus, if any, to A., gives no interest to A.
- All joint-tenants, &c. of equitable estates may acquire settlements upon them.
- A devise to trustees to pay the rents, &c. to A., B., and C., gives them all an interest in the estate.
- But if it is to A., B., C., all or any of them, as the trustees think fit, and A. receives nothing, he has, it seems, no estate.
- If there be several next of kin, none of them have any equitable estate.
- A mere right or franchise will not give a settlement.
- Instances of rights, franchises, &c. which do not give an interest in land.
- A widow's quarantine gives her a settlement.
- The estate may be acquired by any mode, except by purchase for less than 30*l*.
- It may be acquired by operation of law, or by the act of the parties.
- Of the stat. 9 Geo. I. cap. 7.
- It applies only to those purchases in which money is the sole consideration :
- To all such it applies, in whatever way the money is to be paid.
- The value of the estate is not to be taken into the account.
- Of what the purchase-money is to consist.
- The purchaser may borrow the money.
- Or part of it may be paid for him by a third person.
- But if that third person pays it on his own account, it is not money paid by the purchaser.
- If 30*l*. be paid, the estate will give a settlement, though a smaller sum be stated in the conveyance.
- The amount of purchase-money *paid by the purchaser* is the criterion. The value is immaterial.
- No act or conveyance of the purchaser can give him an immediate settlement, if the estate was bought for less than 30*l*.
- But if a woman purchases for less than 30*l*., and then marries, the husband may gain a settlement, and then his settlement is imparted to the wife.

If the estate is not a purchased estate, a very minute interest will give a settlement.

Of the title of the party :

Whether he is capable of taking or holding, is a question of law.

Even an alien, as it seems, may gain a settlement by means of an estate.

The character, in which the party claims, is a question partly of law and partly of fact ; question of law, as to the effect of the conveyance, &c. ; question of fact as to identity, and as to possession.

Of residence :

If the person has a complete title, he gains a settlement by residing forty days in the parish.

A party ousted has not a complete title ; no more has a mortgagee who is not in possession.

The residence need not be upon the estate.

There is no time within which the residence must be comprised.
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CHAPTER VII.

Of Settlement by Office.

Origin of a settlement by office.

Definition of a settlement by office.

An office must be either derived from the crown, or created by statute.

The master of a work-house has no office : nor the master of a charity-school.

Offices belonging to a manor, &c. are derived mediately from the crown ;

The office of churchwarden, overseer, &c. are created by statute. The office must have special relation to the inhabitants of the parish.

The statute 3 W. and M. cap. 11. applies only to inferior officers.

The office need not extend over the whole parish ;

Need not be confined to one parish ;

Must be exercisable in that part of the parish where the officer lives.

The person executing the office must do it on his account, and not as a deputy ;

But, being appointed to an office, he may execute it by deputy.

The officer must execute the office for a whole year ; which must be a year in law, and he must execute it continuously.

No settlement is gained till the end of the year.

A residence of forty days is necessary.

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CHAPTER VIII.

Of Derivative Settlements.

Definition of a derivative settlement.

Derivative settlements are acquired either by marriage or by parentage.

The settlement, which belongs to the head of a family, devolves upon the subordinate members of the family.

Definition of a family.

The husband is the head of the family. After his death, the widow is the head, until she marries again.

And the wife is *quasi* the head of the family, if the husband's settlement is unknown.

The subordinate members of a family are,

1. The wife, when not the head ; 2. Legitimate unemancipated children.

Of emancipation :

Of the modes by which it may be effected.

1. By gaining a settlement.
2. By any relation which puts an end to parental authority ; as by marriage, whether the party live with the parents, or separate from them ; or by a son enlisting as a soldier, marine, &c., but not by enlisting in the militia.
3. By separation, independence, and full age.

Emancipation is not effected, if the child, when under age, returns home, without having gained a settlement, or under a discharge from the army, &c. Or if the child, though of full age, continue to live at home ; or if the child, though separate, and living independently of the parents, is a minor ; or if the child, though of full age and living separate, is supported by his parents.

Of the time at which emancipation begins.

It begins, either when a settlement is completed, or when the parental authority is at an end, as at the instant of marriage, or upon the son, who is a soldier, &c., coming of age ; upon which his emancipation relates back : or when separation, independence, and full age, all co-exist ; but in this case, the emancipation does not relate back.

Nor does it relate back, where the son continues up to the time of his full age absent from his father's house, in the situation of servant or apprentice.

Relation is confined to cases where there is a control paramount to that of the father.

The wife *instantly* acquires the settlement of her husband ;

And the children that of their father ; or that of their mother when she is head of the family.

And it is the same with a posthumous child.

The settlement of the children is not changed by the widow's re-marriage.

If the husband has no settlement, or his settlement is unknown, the children follow the maiden settlement of their mother.

But, in the case of an Irishman or Scotchman having no settlement, the wife and children are to be removed with the husband to Ireland or Scotland. If he dies or leaves his family, they must be removed to the wife's place of settlement.

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CHAPTER IX.

Of Settlement by Birth.

Foundation of a settlement by birth.

Of the persons who acquire a settlement by birth.

Of bastards :

A bastard is settled in the place of its birth ;

Unless the mother was brought into the parish by fraud or a wrongful removal ;

Or continued in the parish after a rightful removal ;

Or was *in transitu* under an order of removal ;

Or was in a state of vagrancy, or in prison, or in a lying-in-hospital, &c. ;

Or was living in the parish as a member of a friendly society ;

But if she was there under a certificate, her bastard is settled in the parish.

Bastards are not to be removed from the mother until they are seven years old.

Of legitimate children, whose parents have no known settlement, or no settlement at all :

A child, born here of Scotch or Irish parents, may be removed to Scotland or Ireland with its parents ;

But if the parents are dead, &c., the child cannot be removed thither.

A residence of forty days in the parish seems to be necessary.

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PART THE SECOND.

CHAPTER I.

On the Proofs of a Settlement by Hiring and Service.

Proof of the contract of hiring, if an express one.

An oral contract, how to be proved.

Contract in writing, how to be proved ;

1. When it is thirty years old ;

2. When it is less than thirty years old, and attested ;

3. When it is less than thirty years old, and not attested.

No stamp is required, unless the hiring be by deed.

The written contract is the only evidence, unless it is altered by a subsequent independent agreement.

Upon proof that the instrument is in the possession of the opposite party who has had notice, and who refuses to produce it ;

Or that it is lost or destroyed, proof of its execution being, in the latter case, first given ;

A copy may be given in evidence ; or if no copy exists, oral evidence may be given of its contents.

Of the proofs of a general hiring.

Instances of general hirings.

The apprehension of the parties cannot affect the legal sense of their agreement.

Of the proofs of a hiring at will.

Instances of hirings at will.

A hiring at monthly wages is a monthly hiring ;

A hiring at weekly wages is a weekly hiring,

Although the engagement may be for as long a time as the master and servant can agree ;

Or for such wages *summer and winter* ;

Or for so much a week, with an increase per week in the harvest ;

Or for so much a week, and *two guineas for the harvest*.

But a hiring at weekly wages to part at a month's notice, is a general hiring.

A hiring at weekly wages to part at a week's notice, or at monthly wages and a month's notice, is not a general hiring.

Of the proofs of a specific hiring.

Instances of yearly hirings.

Neither a hiring for 52 weeks ; nor, probably, a hiring for 365 days ; and certainly not a hiring for a period containing 365 days in leap-year, is a good yearly hiring.

Weekly wages do not control a hiring intended to be for a year.

Evidence as to intention.

They do control a hiring where no such intention appears. Evidence as to intention.

Instances of conditional hirings for a year.

Proof of the contract of hiring if an implied or constructive one :

1. Where there has been no previous contract ;
2. Where there has been a previous contract, either a valid one, or an imperfect one, for a year ;
3. Where there has been one for less than a year.

Of the presumptions *against* a constructive hiring.

Employment out of charity ; relationship ; wages paid weekly or monthly ; working by the piece ; custom of the county to hire half-yearly.

Proof of the service for a year.

Service *in fact* how to be proved.

Service *in law* how to be proved.

Absence in the middle of the service is presumed to be sanctioned.

Absence at the beginning of the year must be justified or excused.

Absence at the end of the year must be shown to be by dispensation.

Of the dissolution of the contract ;

1. By consent ; and how such consent is to be proved on the part of the master, and on the part of the servant ;
2. By either party having sufficient cause of complaint ;
3. By a justice of peace ;
4. By the wrongful and continued absence of the servant.

Difficulty of reconciling the cases on dispensation.

Of the principle on which the Court of King's Bench has acted in reviewing the decisions of the sessions, although mere questions of fact.

A different rule has of late been adopted by the Court ;

And it will not now interfere in the determination of questions of fact ; but will confirm the conclusion drawn by the sessions, unless it be glaringly wrong.

How far decisions in King's Bench upon questions of fact are binding as authorities.

The question is sometimes one of fact mixed with law : instance of such a question.

Sometimes one wholly of law.

Of the circumstances which prove a dispensation.

Residence for forty days, how to be proved.

Of the mode of proving a certificate.

By stat. 3 Geo. 3. c. 29., nothing need be proved, except that the certificate comes out of the proper custody.

Delivery of the certificate, how to be proved.

The time of delivery will be presumed to coincide with the time of the person's going into the parish.

If the certificate cannot be produced, its existence and delivery must be proved.

The certificate, though incorrect, or though including the person by mistake, is still conclusive as to the fact of the person's residence under it.

Cases of dispensation.

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CHAPTER II.

On the Proofs of a Settlement by Apprenticeship.

Binding, how to be proved.

Deed to be produced, if possible, and to be proved (unless it is thirty years old) by the subscribing witness; whose hand-writing must be proved, if he cannot be called.

If there was no subscribing witness in fact or in law, the execution of the deed by the parties must be proved, either by some one who was present, or by proof of their hand-writing.

The deed must be executed either by the party himself, or by his attorney constituted by deed.

The party to be bound himself, or to bind others, must execute the deed.

Upon proof that the deed is in the possession of the opposite party who has had notice, and who refuses to produce it;

Or that it is lost or destroyed, it being, in the latter case, first properly authenticated;

A counterpart, or other copy, may be given in evidence:

Or, if there is none such, oral evidence may be given of its contents.

Of the persons whose execution must be proved:

1. In the case of one binding himself;
2. In the case of a parish binding under stat. 5 Eliz.;
3. In the case of a binding under stat. 56 Geo. 3.;
4. In the binding of a boy to the sea-service;
5. In the binding of chimney-sweepers.

Of the objections which invalidate an indenture of apprenticeship:

Want of proper stamp; terms not creating an apprenticeship: which two objections apply to all bindings.

Objections in the case of one binding himself.

Objections in a binding under stat. 5 Eliz.

Objections in a binding under stat. 56 Geo. 3.

Objections in a binding to the sea-service.

Objections in a binding to a chimney-sweeper

Residence how to be proved.

It will be proved, if it be shown that the apprentice slept for forty nights in some one parish while serving the original

master, and if his sleeping there was connected with the service.

Circumstances, which show that the residence was not connected with the service, should be brought forward by the opposing party; which party should also prove a certificate, if there was one.

If the settlement depends upon a service with a second master, the party proving the settlement must show the consent of the first master;

Which consent may, in certain cases, be either by word of mouth or in writing.

Instances of consent by word of mouth.

If the consent is by writing, the writing must be stamped and duly proved.

If not stamped, it cannot be admitted in evidence.

To show the service of a parish apprentice with a second master since 1st October 1816, the written assignment must be proved:

If it cannot be produced, parol evidence may be given of its contents.

Objections which may be made to this service with a second master, and which it lies with the opposing party to make.

If the settlement depends upon a service with a third master, &c. the party proving the settlement must also show the consent of the second master, &c.

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CHAPTER III.

On the Proofs of a Settlement by Renting a Tenement.

Of the proofs of a settlement by renting before 2d June, 1819.

1. It must be proved that the thing taken was a tenement;
2. That there was a taking and occupying as tenant; that is, as lessee, or sub-lessee, and not as assignee of the term.

Of the modes of proving a tenancy.

A tenancy may be proved, first, by proof of the contract and of occupation;

Or, secondly, by proof of occupation, and of payment of rent;

Or, thirdly, by proof of occupation, and by showing who was the landlord or owner; for it will be presumed that the occupier was in as original lessee, and with the assent of the landlord or owner;

And, fourthly, if the occupier is dead, by proving his occupation, and giving in evidence his declaration as to the terms on which he held.

Of the proofs by which a *prima facie* case of tenancy may be rebutted.

If the party was not the original taker, he must be proved to have been sub-lessee.

An under lease how proved.

Of the proof of yearly value :

The value may be proved either by means of competent persons ; or, as a *prima facie* case, by means of the rent.

Of the proof of residence for forty days in the parish.

Of the proofs of a settlement by renting from 2d June, 1819, to 22d June, 1825.

1. It must be proved that the tenement was all in one parish.

If it is a question whether the tenement is all in one parish, then the bounds of the parish must be ascertained ;

Which may be done either by proof of perambulations ; or by proving the exercise of parochial rights within these bounds ; or by evidence of reputation.

It must be shown that the tenement consisted either of land or of buildings, or of both ; and that the building was a separate and distinct building.

2. It must be proved that the party hired the tenement at the rent of 10*l.*, at least ;

This may be proved, either expressly, by means of the lease or written agreement, if there was any ; or, if no written agreement, then by proof of the parol agreement ;

Or it may be shown impliedly, by proving an occupation for a year, and the payment of a year's rent.

3. It must be proved that the party held or occupied for a year.

4. It must be proved that he paid a year's rent :

This payment may be proved by any witness to the fact ; or by a receipt, if the lessor or his agent is dead.

If no actual payment was made, there must be proof of a legal tender.

A legal tender is of two kinds, actual and constructive.

Definition of an actual tender.

Definition of a constructive tender.

5. It must be proved that the party resided forty days in the parish.

Of the proofs of a settlement by renting, since 22d June, 1825.

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CHAPTER IV.

On the Proofs of a Settlement by Payment of Rates.

Division of the subject.

1. Of the proofs of a settlement by rating before the 22d, June 1795.

To prove the rating, the rate should, if possible, be produced.

Whether produced or not, unless the non-production be the act of the opposite party, it must be authenticated.

If it cannot be produced, secondary evidence may be given.

If a copy, given under stat. 17 Geo. 2., c. 3. s. 2., is offered in evidence, it need not be proved to be an examined copy: any other copy must be proved to be an examined copy.

If no copy can be produced, then oral evidence may be given of the rate.

If the party is rated in his own name, then his identity is to be proved.

If he is not rated in his own name, it must be shown that he was the party intended to be rated, by proving that he was the occupier, and that his occupation was known to the parish officers.

Instances of assessments not in the party's own name.

Of the proof of payment:

Whether a payment must be proved, or will be presumed without proof, is a matter of doubt.

Of the proof of residence.

2. Of the proofs of a settlement by rating from 22d June, 1795, to 22d June, 1825.

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CHAPTER V.

On the Proofs of a Settlement by Estate.

Of the proofs of a settlement by estate.

A right must be proved to such an estate as will give a settlement.

Proof of possession alone is not sufficient; for, though from such proof a seisin in fee is to be presumed; yet the seisin may be of an estate purchased for less than 30*l*.

Therefore so much of the title must be disclosed, as excludes the notion of such a purchase.

In what cases this notion will be excluded.

In what cases title must be proved.

Of the proofs of the title of husband; of executor; of administrator; of guardian in socage; of tenant by *elegit*; of conusee of a statute merchant, &c.

Title by devise of a freehold interest is to be proved by the will.

The will must be proved by one of the subscribing witnesses, if any one of them can be called.

Of a will thirty years old.

Secondary evidence.

A devise of copyhold how proved.

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Proof of a claim under a deed; under a written agreement,

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Proof of a copyhold interest.

Evidence of identity.

Of the means by which a title may be impeached.

Of the proof of residence.

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On the Proofs of a Settlement by Office.

Of the proofs of a settlement by office :

1. The appointment must be proved ;
2. Execution of the office for a year ;
3. Residence for forty days.

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CHAPTER VII.

On the Proofs of a Derivative Settlement.

Of the proof of a settlement by marriage.

Besides estoppel, there are four modes in which a marriage may be proved :

1. It may be proved by immediate evidence of the fact.
2. A marriage may be proved by hearsay evidence of the fact. The persons, whose declarations are offered in evidence, should be proved to be either parties, or relations, or intimate friends, or servants.

And no declaration can be admitted that is made *post litem motam*.

3. A marriage may be proved by reputation.

Cohabitation as man and wife, how proved.

4. A marriage may be proved by a sentence in the Spiritual Court ; which sentence is, in all cases, conclusive. Mode of proving such a sentence.

A marriage may be disproved by a sentence of nullity ; or by showing that there was no marriage in fact, or that it was an illegal one.

Marriages before stat. 26 Geo. 2.

Marriages in England since stat. 26 Geo. 2. c. 33., before stat. 4 Geo. 4.

Marriages of minors, by license, without consent of parents or guardians.

Of the requisites to a good marriage under stat. 26 Geo. 2. c. 33. Banns ought to be published three times ; and in the true names of the parties.

Names acquired by repute, how far to be considered as the true names.

Three rules upon the subject of fraud :

1. If the names were the true names, no fraud vitiated the marriage.
2. If the variation of name was *total*, the marriage was void, though there was no fraud.
3. *Partial* variations might be explained.

A marriage by *license* was not vitiated by a false name in the license.

In what cases, since stat. 4 Geo. 4., c. 76., marriages are null and void.

The marriages of minors by license, without consent of parents or guardians, not void.

The marriage acts are confined to England.

Marriages out of England must be contracted according to the law of the place. Rule upon this subject.

Marriages of Jews or Quakers, must follow the laws and customs which prevail among them.

A marriage in England before the first Marriage Act, and a marriage in any place that is under English law, how impeached.

A marriage in England, from 25th March, 1754, to 1st Nov. 1823, how impeached.

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A marriage of Quakers or Jews, a marriage in Scotland, or in any foreign Christian state, how impeached.

Marriages, universally, may be impeached, by proving a former subsisting marriage, or want of reason in one of the parties. By stat. 15 Geo. 2. c. 33., no lunatic can marry until declared of sound mind.

Of the proof of a settlement by parentage.

First, the marriage of the parents must be proved, as before.

Secondly, the birth of the child, within lawful wedlock, is to be shown, either by direct proof, or by proof of reputation in the family or even in the neighbourhood.

On the other side it may be shown, that the child was born before the marriage ;

Or the marriage itself may be impeached ;

Or non-access of the husband may be shown ; and non-access is to be proved like any other fact ; but it cannot be proved by either the husband or wife.

CHAPTER VIII.

On the Proofs of a Settlement by Birth.

To prove that the party was born in a particular parish, no hearsay evidence is admissible. The fact of the birth to be proved by witnesses ; cannot be proved by the party himself. The register of baptism *per se* is no proof of the place of birth. Of the proof of residence, if any be necessary.

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On the Evidence derived from an Order of Removal, from a Certificate, and from Relief.

1. Of an order of removal.

If acquiesced in, or on appeal confirmed, it is then conclusive evidence in favour of all parishes.

If quashed upon the merits, it is then only conclusive between the two parishes, and is no evidence for a third parish.

If quashed for matter of form only, it is no evidence at all.

Of the mode in which an order of removal is to be proved.

How to be authenticated.

In what cases an order may be controverted, or treated as a nullity.

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Of the points which are essential to an order of removal, as matters of fact.

Of the matters which should appear upon the order.

The order, though a good one, may be shown to be abandoned by the parish in whose favour it was made.

Of the mode of proving a judgment of the sessions.

2. Of a certificate. Definition of a certificate.

In what cases conclusive evidence ; in what cases not conclusive.

Of the manner of proving a certificate.

Who may take advantage of defects in a certificate.

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All the circumstances should be stated in the examination itself.

Requisites to make the examination evidence.

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No other copy but the attested copy can be given in evidence.

There must be proof of the identity of the party; and also (according to Bayley, J.) of his being a soldier, in quarters, &c. But *quære*.

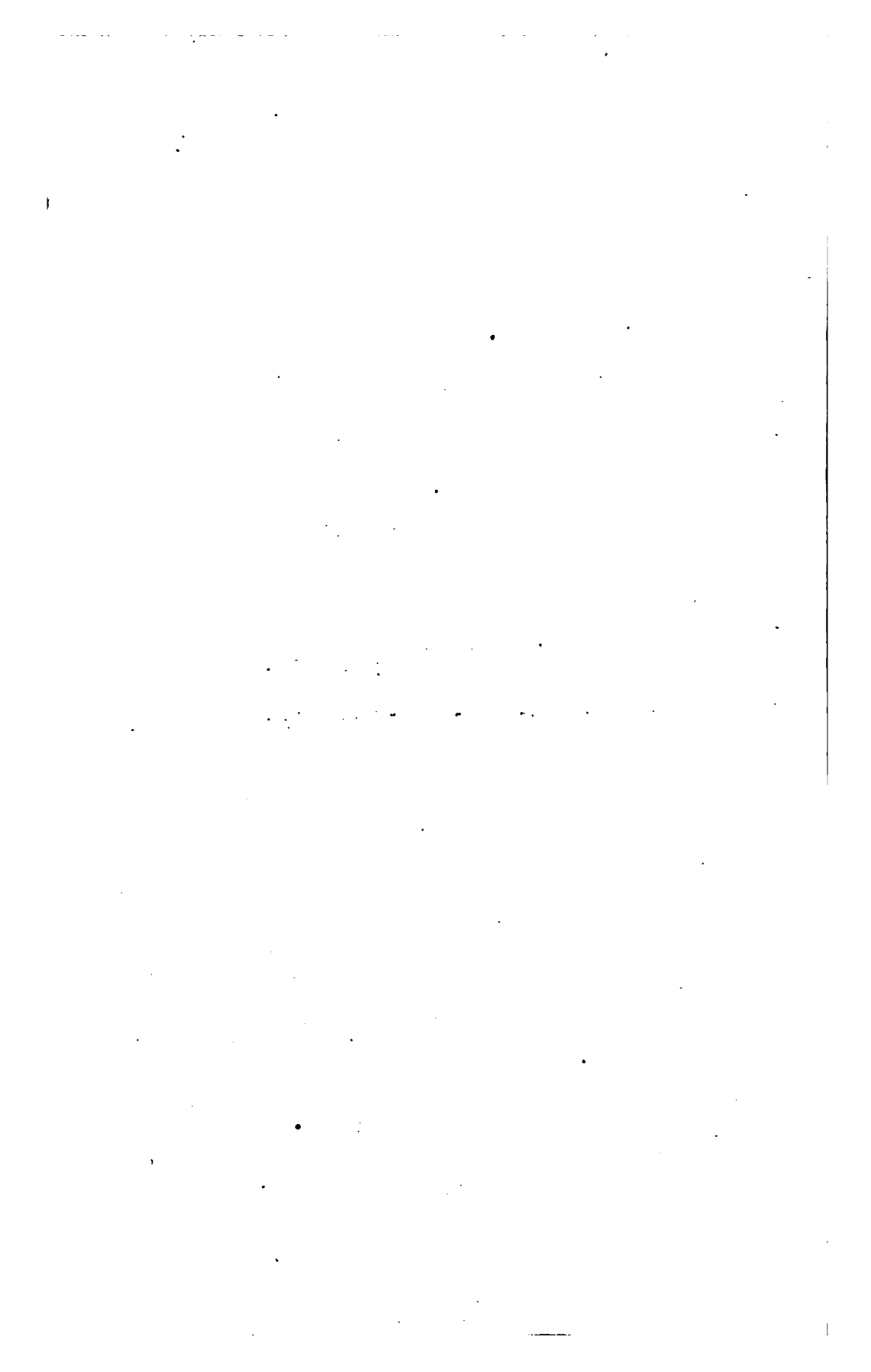
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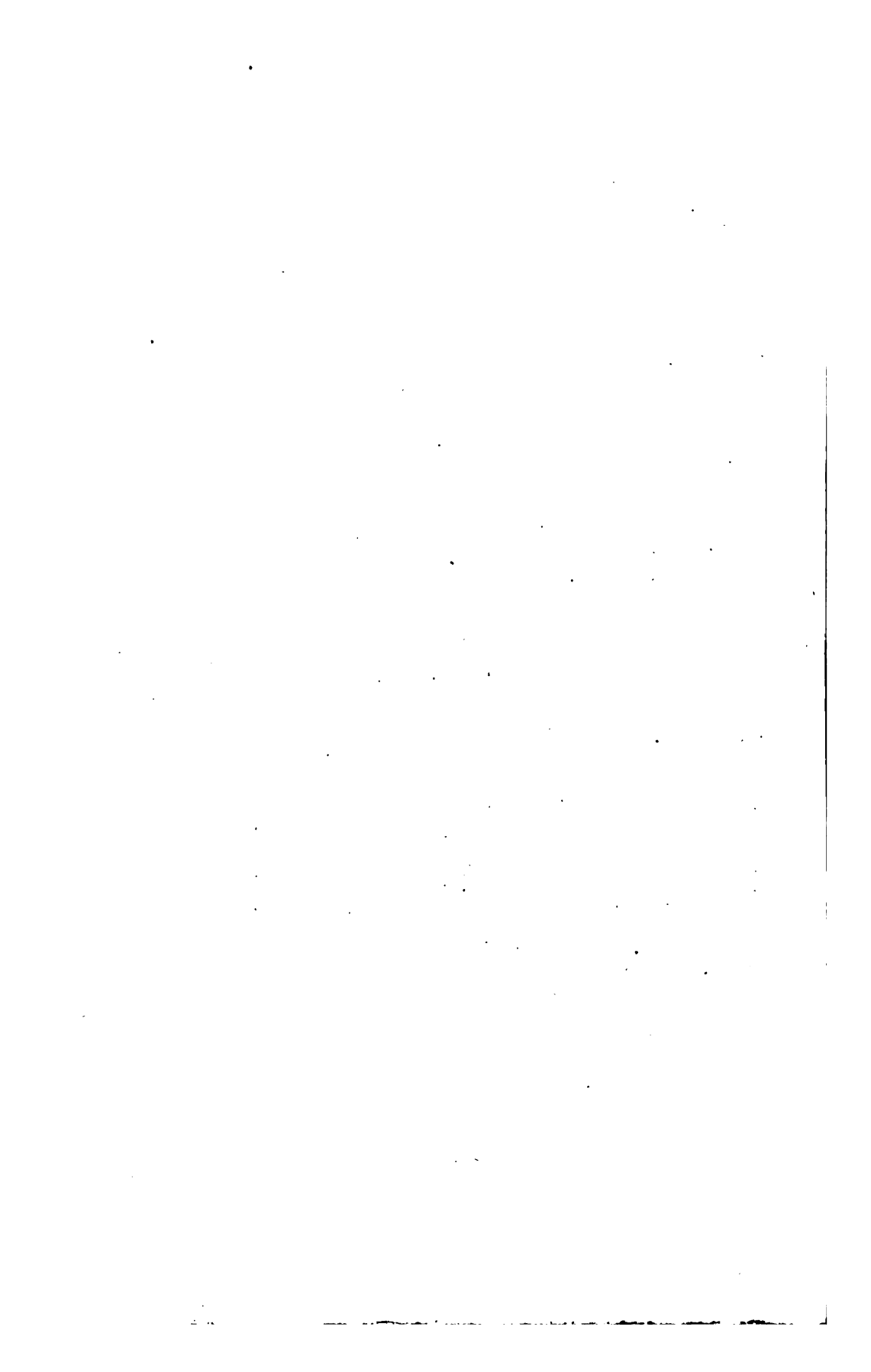
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A TREATISE

ON

PAROCHIAL SETTLEMENTS.

PART I.

LAW OF SETTLEMENT.

CHAP. I.

Of Settlements in general.

BY the term settlement, is to be understood a permanent indestructible right to take the benefit of the poor laws in any given parish or place which maintains its own poor.

Definition of
a settlement.

First, a settlement is a permanent thing. It continues in the person who is entitled to it, until a new one is acquired. (1)

A permanent

Secondly, a settlement is an indestructible thing. It is not in the nature of a franchise which is capable of being forfeited. It is not affected by an attainder, but will be communicated or transmitted from person to person just as if no such attainder existed. (2)

indestructible
right

Thirdly, a settlement entitles the person, who has gained it, to such relief as is provided by the poor laws.

to take the
benefit of the
poor laws
in any given
parish or
place which
maintains its
own poor.

Fourthly, a settlement is a local right. It is confined to the limits of some place which maintains its own poor. Such place may either be a parish, or a township or hamlet, even though the township or hamlet be extra parochial; for overseers may be appointed to an extra parochial township or village. (3)

(1) *R. v. St. Botolph's*, Burr. s. c. 367.

(2) *R. v. St. Mary Cardigan*, 6 T. R. 116.

(3) *R. v. Rufford*, 1 Stra. 512. As to what is a vill or township, see Burn's J., vol. iv. p. 4.

I shall, in the course of this treatise, whenever I have occasion to speak of a place, generally, as a place maintaining its own poor, make use of the word parish; and it must be borne in mind, that whatever is, on such occasions, said of a parish, is equally true of a township, or hamlet. Whenever I employ the term parish, in opposition to township &c., such opposition will sufficiently appear from the context.

Who may acquire this right.

All persons whatsoever, unless under some particular disability, not only natural-born subjects of England and Wales, but Scotchmen and Irishmen, (1) and Foreigners, (2) may acquire this right by some one or other of the modes hereafter mentioned.

There are three kinds of settlements.

Settlements are of three kinds.

The first is a settlement acquired by the act of the party, and in his own right.

The second, a derivative settlement, or a settlement which a party acquires in right of another, without any act of his own.

The third, a settlement in the party's own right, but also without any act of his own.

First, a settlement by the act of the party and in his own right. How acquired.

1. A settlement by the act of the party and in his own right, may be acquired in six different ways. 1. By hiring and service. 2. By apprenticeship. 3. By renting a tenement. 4. By payment of rates. 5. By estate. 6. By office.

Persons who cannot gain a settlement of the first kind, feme covert; alien enemy.

Persons wholly incapacitated from gaining a settlement of the first kind, are the following:—1. A feme covert. (3) 2. As it seems, an alien enemy. (4)

Whether a person who is attainted can gain a settlement for himself, before the attainder is reversed, was at one time a matter of some doubt. But it seems to be now settled that he is competent to gain one. (5)

Infant under seven years can gain a settlement by estate.

An Infant during the age of nurture, that is, under seven years of age, cannot acquire a settlement by any of the modes above enumerated, except by estate. (6)

To gain a settlement by

If a person is not sui juris, that is, not in a condition to contract for the disposal of his time and services, he cannot

(1) Per Lawrence J. in *R. v. Eastbourne*, 4 East, 106.

(2) *R. v. Eastbourne*, 4 East, 103.

(3) *Aythorp Rooding v. White Rooding*, 2 Bott, 75.

(4) See *R. v. Eastbourne*, 4 East, 107.

(5) *R. v. Haddenham*, 15 East, 463. In which case an attainted felon was discharged by an order under the sign manual; but it did not appear that he had ever received a formal pardon; rather indeed that he had not. He was held to have acquired a settlement by purchase of a copyhold estate.

(6) *R. v. Hasfield*, 2 Stra. 1131, Burr. s.c. 147.

not gain a settlement by hiring and service, or by apprenticeship. As, for instance, an apprentice cannot hire himself as a servant, (1) nor a soldier bind himself to serve, either in the capacity of servant, or in that of apprentice. (2)

hiring and service or by apprenticeship, the party must be *sui juris*.

If a person is residing in a parish under a certificate, he can acquire a settlement there in three only of the above ways, namely, by office, by renting a tenement, and by estate; the two former, by statute 9 and 10 W. 3. c. 11., the latter, upon the reason of the thing, "since a property of a man's own, is a stronger case than hiring another person's." (3) And whether the estate come to the party by operation of law or by his own act, the effect is the same. In all cases it will confer a settlement. (4)

A person residing under a certificate cannot gain a settlement in the parish except by office, by renting a tenement, or by estate.

No gate-keeper or toll-keeper of any turnpike-road or navigation, or person renting the tolls and residing in any toll-house of any turnpike road or navigation, can thereby gain any settlement in the parish. (5)

No collector of tolls can, as such, gain a settlement;

No collector or person renting tolls on any turnpike road, or residing in any toll-house thereon, and no apprentice or servant of any such collector or person, can thereby gain a settlement in any parish whatsoever. (6)

Nor any servant or apprentice of such collector;

Nor can any person gain a settlement by reason of any residence in a house provided by any charitable institution, as long as he is supported as an object of charity at the expense of the institution. (7)

Nor any person while maintained in any charitable institution;

No person can gain any settlement by reason of residence within any parish, while he is detained or confined, as a prisoner within such parish, on any civil process or for any contempt. (8)

Nor any person while a prisoner on civil process, or for any contempt.

II. The second species of settlement is a derivative settlement.

Second kind of Settlement. Derivative settlements.

A derivative settlement is a settlement which a person derives from a settlement previously acquired by another; the two persons having such relation to one another, that, by operation of law, the settlement of the one, who is con-

Definition of a derivative settlement.

(1) See the cases cited in *R. v. Norton*, 9. East, 207, note (a).
 (2) *R. v. Norton*, 9 East, 206.
 (3) *R. v. Cold Ashton*, Burr. s. c. 444. See what is said there by Lord Mansfield, 450. *R. v. Deddington*, 2 Stra. 1193. Burr. s. c. 220., and several earlier cases which it is unnecessary to cite.
 (4) *R. v. Deddington*, note (3)
 (5) Stat. 54 Geo. 3. c. 170. s. 5.
 (6) Stat. 3 Geo. 4. c. 126. s. 51.
 (7) Stat. 54 Geo. 3. c. 170. s. 6.
 (8) Stat. 54 Geo. 3. c. 170. s. 4;

It may be acquired in two ways; 1. By marriage; 2. By parentage.

Third kind of settlement. A settlement in the party's own right, but without any act of his own. Acquired by birth.

sidered the more worthy, immediately devolves upon the other, who is regarded as dependent upon him.

A derivative settlement may be acquired in one or other of the following modes:—1. By marriage, which is the settlement that a woman derives from her husband. 2. By parentage, which is the settlement that children derive from one or other of their parents.

III. A settlement in the party's own right, without any act of his own, is the settlement which is acquired by birth; the settlement, to which, in default of any other, a person is entitled, if born any where in England or Wales.

The order in which I shall examine the principles of settlement law is the following. First, I shall treat of settlements by the party's own act and in his own right, and of the modes by which they may be acquired. In the next place, I shall, in a similar manner, discuss the subject of derivative settlements. Lastly, I shall state the law relating to settlements by birth.

I follow this order, because it is the order in which all inquiries respecting the settlement of a poor person should be conducted. For if he has acquired a settlement by any act of his own, this settlement supersedes any which he may previously have derived from others. And if he has acquired no such settlement by his own act, then recourse must be had to that which devolves upon him as a derivative settlement. And if no settlement of either of these kinds can be shown to belong to him, then, in the last place, inquiry must be made as to his birth settlement. In default of which, he must be relieved, as casual poor, by the parish in which he happens to be found.

CHAP. II.

Of Settlement by Hiring and Service.

Foundation of a settlement by hiring and service.

A SETTLEMENT by hiring and service, as it now stands, is principally founded upon the following statutes:

The statute 3 and 4 W. and M. c. 11. s. 7, which enacts, that if any unmarried person, not having child or children,

shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein :

The statute 8 and 9 W. 3. c. 30. s. 4, which declares that no person so hired as aforesaid, shall be adjudged or deemed to have a good settlement in any parish or township, unless such person shall continue and abide in the same service during the space of one whole year :

And the statute 13 and 14 Car. 2. c. 12, which directed that poor persons, subject to removal, should be removed to the parish, where they had last inhabited by the space of forty days.

A settlement by hiring and service is gained, where one, being at the time of the hiring not only *sui juris* but unmarried and without children, is hired prospectively for a year into any service, except that of a toll-collector, (1) abides for a year in that service, and resides for forty days, under that service, in any parish, in which neither himself nor his master are living under a certificate : which settlement may shift from parish to parish as the servant changes his place of abode, but is finally in that parish where, within the space of a year, he completes a residence of forty days, provided he has had at any time during the year the character of a yearly servant while living in that parish.

Definition of a settlement by hiring and service.

This is the general proposition ; from which it appears that there are three grand requisites, in order to complete a settlement of this kind.

I. There must be a hiring for a year.

II. There must be a service for a year.

III. There must be a residence of forty days in some one parish or place.

I. In the first place must be considered the hiring for a year. As to which, several rules comprised in the above definition must be stated more at large.

Of the hiring for a year.

And, first, with respect to the person hired. He must be *sui juris*, that is, in a condition to dispose of his time and services. (2) If he is in the army he is incapable of making any engagement as a hired servant. His whole time is at the disposal of the crown. And even if he be invalided, and by an arrangement, which has the sanction of government, have leave of absence, upon his relinquishing his pay ; still being liable to be called into actual service at a moment's warning, and his leave being, as is usual, for a limited period

The person hired must be sui juris at the time of the contract. A soldier is not free to hire himself as a servant.

(1) Chap. I. p. 3.

(2) Chap. I. p. 3.

	of time less than a year, he is incapable of communicating to his master an absolute right to his service for the year. (1)
A militia man is ;	It has certainly been decided that a militia man, that is, one liable to be called out to serve in the militia, may engage as a yearly servant, and that his stipulating for an absence from his master's service, in the event of being called out, is not to be regarded as an exception out of the contract. (2)
Provided he informs the person hiring him of his being in the militia.	In this case, however, it has been adjudged that the master must be made acquainted with the circumstances under which the servant contracts with him, and that if the servant hires himself without making this communication, he thereby makes an absolute contract for a year, whereas, at the utmost, he was only capable of making a conditional one. (3)
The person hired must be a free agent.	In the next place, the person contracting must be a free agent. He must either have made the contract himself, or have adopted it, if made by another. This will appear from the following case :
Instance of a compulsory hiring.	A poor boy of the age of fourteen, was allotted by the officers of the parish to J. S. J. S. told the boy he had procured him a service with A. The boy did not object, conceiving he had no discretion on the subject. He went to A. who received him, and told him that he would give him his clothes and that he was to stay with him a year. Now in this case the boy conceived that he was obliged to accept the service, as being under the control of others. He cannot therefore be considered as having adopted the act of J. S. For the adoption of a contract must be the act of a free agent. (4)
Instance of free agency.	But if instead of the contract being made by another, it is originally made by the boy himself, who voluntarily engages in the service of A.; and reference is made afterwards to the parish officers for the purpose only of obtaining clothes for him, this is a contract fully and freely entered into by the party himself, and his requiring assistance from the parish cannot affect his capacity to make such an agreement. (5)
The person hired must also be un-	The person hired must be unmarried, that is, without a wife. (6) He must also be without children; by which is meant unemancipated children; (7) for an emancipated child,

(1) *R. v. Beaulieu*, 3 M. and S. 229.

(2) *R. v. Westerleigh*, Burr. s. c. 753. *R. v. Winchcomb*, Doug. 391.

(3) *R. v. Holsworthy*, 6 B. and C. 283.

(4) *R. v. Stowmarket*, 9 East, 211.

(5) *R. v. Dunton*, 15 East, 352.

(6) *Anthony v. Cardigan*, Fort. 309. 2 Bott, 177. There the person hiring himself was a widower.

(7) For the subject of Emancipation, see Chap. VIII.

not being considered an incumbrance to the father, is not married and without child, in law an obstacle to his gaining a settlement under this head. (1)

And it must be remembered that the time, at which we are to look for these qualifications, is the time when the contract is made. (2) If he is in a capacity then to fulfil the conditions of the statute, he will not forfeit his title to a settlement by marrying after the contract is made, and before the commencement of the service. (3)

Next, of the hiring. In the idea of a hiring is necessarily included that of a contract. If it appears from the circumstances of the case that there was *no contract*, then is there wanting one essential ingredient in the settlement. There must be a legal contract, or engagement.

Suppose that A. out of kindness, invites B. his relation to come and live with him, and assures B. that if he will do so, he shall have his food, washing, and lodging. Notwithstanding that B. under this promise lives with A., and performs the offices of a servant in the family, he cannot gain a settlement by such service; because the facts of the case show that there was no legal contract or agreement for service which was binding upon the parties, nothing beyond a mere encouragement to B. that if he would live with A. his relation, that relation would maintain him. (4) Being taken as a relation, without any hiring,

But the relationship of the parties, however near it may be, is no bar to their entering into a contract of hiring and service. A child may gain a settlement as hired servant to his father. (5) The only question in such a case will be whether the hiring were *bonâ fide* or not. And it makes no difference whether the child at the time of hiring was, or was not, emancipated. (6)

Suppose next that A. takes B. into his family out of charity, there being no contract or stipulation between the parties. B. cannot, by any services which he may perform in A.'s family, acquire a settlement; for the statute requires not only actual service, but a legal obligation to serve. (7) Or being taken out of charity, is not sufficient.

(1) *R. v. Cowhoneybourne*, 10 East, 86.

(2) See, in *R. v. Allendale*, 3 T. R. 384, what is said by Lord Kenyon.

(3) *R. v. Allendale*, 3 T. R. 382.

(4) *Gregory Stoke v. Pitminster*, 4 Burn, 345. See further, as to Relationship, Part II. Chap. I.

(5) *Chesham v. Missenden*, 4 Burn, 342, 2 Bott. 178. *R. v. Chertsey*, 2 T. R. 37. And see the argument of Grose, J. in that case. *R. v. Chillesford*, and *R. v. Winslow*, 4 B. and C. 94.

(6) *R. v. Chillesford*, and *R. v. Winslow*, 4 B. and C. 94, in each of which cases the child was not emancipated.

(7) *R. v. Weyhill*, Burr. s. c. 491. See further as to a hiring out of charity, Part II. Chap. I.

The contract may be either express or implied.

Express hirings are either general or specific.

Definition of a general hiring.

It is a hiring for an indefinite time.

But a mere hiring at will is not a general hiring.

Definition of a specific hiring.

A specific hiring must be one entire contract for a year,

which in law is considered a whole year,

A contract of hiring may be either express or implied ; and I will now proceed to treat them under these separate heads ; first, of express hirings ; second, of implied hirings. And,

First, of express hirings ; which may further be divided into general hirings and specific hirings.

General hirings are, where no term of service is agreed upon at the time of making the contract. A. engages B. as his servant. The relation of master and servant is to continue between them for an indefinite time. That being the agreement, the law calls it a general hiring, and regards it as equivalent to an express hiring for a year. (1) But if the terms of the hiring be such, that the parties engage for so long a time only as pleases one or both of them, the hiring then is but a mere hiring at will, and no settlement can be gained under it. (2) It is essential to a good contract of hiring, that there should be nothing in it which *excludes* the notion of the parties having engaged for a year.

Specific hirings are where time forms an express part of the contract. And in order to see when such hirings shall enure to gain a settlement, it will be necessary to examine a specific hiring in all its parts.

First, then, it must be one entire contract for a year. If a person be hired for any portion of a year, and afterwards for the remaining portion of a year, as from May day to Lady day, then from Lady day to May day, (3) or from Whitsuntide to Martinmas, and again from Martinmas to Whitsuntide, (4) it is clear that the conditions of the law are not complied with. "For if a service under several contracts shall gain a settlement, one that serves by the month, by the week, or by the day, if he continue a year, shall gain a settlement." It ought therefore to be one entire contract.

Secondly, the hiring must be for a year, that *in law* is considered a whole year, whether *in fact* it be more or less. If one hires himself for 52 weeks, although it is vulgarly computed that the year consists of that number of weeks, yet, that term not being a year in law, no settlement can be gained by a service under it. (5)

Nor will it form any ground of exception to what is here

(1) 1 Inst. 42. b. R. v. Wincaunton, Burr. s. c. 299. R. v. Bath Easton, Burr. s. c. 823. R. v. Macclesfield, 3 T. R. 76. ; and see R. v. Seaton and Beer, 2 Bott, 202.

(2) R. v. Christ's Parish in York, 3 B. and C. 499.

(3) Horsham v. Shipley, 2 Bott, 235.

(4) R. v. Lowther, Burr. s. c. 674.

(5) R. v. Astley, 4 Burn's J. 355.

laid down, that the servant was hired for a certain period, which, by the custom of the country, was considered a year. (1) For the statute says there must be a hiring for a year. That year must be a legal year. And no custom can prevail in derogation of statute law.

The rule also holds good, although the hiring for a shorter period than a year be for the express purpose of avoiding a settlement; as where, with that view, one is hired for eleven months, (2) or three days after Michaelmas till the Michaelmas following; (3) these are not hirings for a year, so as to confer a settlement. "And as to the question of fraud, that only arises, where in truth there is a hiring for a year, but the parties endeavour to colour it in order to prevent the pauper's gaining a settlement." (4) In such a case the contract may be pronounced fraudulent. For suppose the master hired the servant three days after Michaelmas to serve till the Michaelmas following, and agreed with the servant that he should give in three days after the expiration of that time. This would be construed to be a hiring and service for a year. (5) For the substance of the agreement is to serve for a year; and that alone should be regarded, and not the form of expression which the parties choose to employ. But the master may, if he please, hire a servant for a less time than a year, for the express purpose of preventing his gaining a settlement. (6)

There are some cases, in which, upon the face of the contract, the hiring appears to be a hiring for a year, though in fact it is not for 365 days. In those cases, which shall now be instanced, notwithstanding this actual deficiency of time, the hiring has been adjudged to be sufficient.

A servant is hired from Whitsuntide to Whitsuntide, that is, from a moveable feast in one year, to the same moveable feast in another year. The law construes this a hiring for a year, though the whole term may not happen to amount to 365 days. (7)

A servant is hired from the 11th of October, the day after Michaelmas, till the Michaelmas following; (8) or is hired from the day after old Martinmas day, until old Martinmas

(1) *R. v. Harwood*, Dougl. 439.

(2) *R. v. Houghton*, 1 Stra. 83.

(3) *R. v. Mursley*, 1 T. R. 694.

(4) Per Buller, J. in *R. v. Mursley*, 1 T. R. 695.

(5) See *R. v. Milwich*, Burr. s. c. 433.

(6) Per Buller J. in *R. v. Mursley*, 1 T. R. 695.

(7) *R. v. Newstead*, Burr. s. c. 669.

(8) *R. v. Syderstone*, 2 Bott, 239.

day following. (1) These are sufficient hirings to gain a settlement. For *until* must be taken to be inclusive. (2) And there being no fraction of a day in law, these are contracts to enter into service the first day of one year, and to serve to the first instant of the next. (3)

of which no part had *expired* at the time of the contract,

Thirdly, the hiring must be for a year of which no part had *expired* at the time of making the agreement. (4) For any retrospective hiring is held to be bad, and no settlement can be gained under it, notwithstanding the whole period of actual service after such hiring shall complete the term of a year. (5) For the contract was vicious at the time of making it, and no subsequent service is of avail to amend it.

and of which no part is *excepted* in the contract. Implied exceptions arising from custom &c., do not affect the contract.

Fourthly, the hiring must be for a year, of which no part is *excepted* in the contract. The exceptions here intended are express exceptions. There is in every contract of hiring some implied exception of hours for relaxation, food and rest. There may be an implied exception from the custom of the country, as that a bleacher who is to get up a certain number of pieces during the week, is to have at his own disposal all the time which is not so employed. (6) There may be an implied exception from the custom of a trade or business, as that a clerk is not to serve beyond a certain number of hours. (7) These implied exceptions do not break in upon general contracts of hiring for the year.

But if there be any express *bonâ fide* exception of part of the time, made when the hiring takes place, that is not a hiring for a year; (8) the law considering it essential to the notion of service, "that the servant should be under the power and coercion of the master during the whole time. (9) If therefore A. hiring himself to B., covenant to work only a certain number of hours in the day, (10) though the number of hours be in fact a reasonable time, (11) or the usual time of any particular trade; (12) or if he stipulate to have sundays

(1) *R. v. Skiplam*, 1 T. R. 490.

(2) See, on this subject, *Pugh v. D. of Leeds*, Cowp. 714.

(3) See *R. v. Skiplam*, 1 T. R. 490.

(4) *R. v. Ilam*, Burr. s. c. 304. *R. v. Topsfield*, mentioned by Bayley J. in Mich. T. 1824. In which case the servant went into the master's service upon trial. After he had been there some months, the master told him he would give him 8*l.* a year. He remained a year altogether; and the Court of K. B. held, with the Sessions, that it was not a hiring for a year.

(5) *R. v. Marton*, 4 T. R. 257.

(6) *R. v. Horwick*, 10 East, 489.

(7) *R. v. All Saints, Worcester*, 1 B. and A. 322.

(8) See what is said by Ashurst J. in *R. v. Sulgrave*, 2 T. R. 379.

(9) Per Lord Kenyon, in *R. v. Kingswinford*, 4 T. R. 220.

(10) *R. v. North Nibley*, 5 T. R. 21.

(11) *R. v. Kingswinford*, 4 T. R. 219.

(12) *R. v. Buckland Denham*, Burr. s. c. 694.

or holidays at his own disposal; (1) he cannot by such hiring gain a settlement.

With still more force will this rule apply to cases where the servant stipulates for any number of working days to be excepted out of the service, (2) or for liberty to hire himself during any part of the year to another master, (3) or in short to have any portion of time at his own command, for the purpose of seeing his friends, (4) or for any purpose whatsoever.

And it is not necessary that this exception of any portion of the time should be expressly stipulated for. It is sufficient if from the nature of the employment, and the terms of the agreement, it appears to have been the understanding of the parties at the time of the contract, that the servant should not place his whole time at the disposal of his master; as the following case will show.

It must be collected from the terms of the contract, whether an exception was intended or no.

B. was hired by A. for three years at 20*l.* per annum, as a looker and to spud thistles. The duty of a looker is to superintend the flocks and fences upon the lands of his employer. When B. was hired, A. told him that he did not think he should have full employment for him, but that he would employ him as much as he could. He was not to do any work for A. other than that for which he was originally hired as a looker, without receiving extra wages. And for such other work he did, in fact, receive extra wages. Now in this case "the master had not the control over the servant for the entire year, but only for so much of the year as the duties of looker required his attention. At other times he was at liberty to employ himself in any manner he pleased, either in working for other persons or for his master, and when he worked for the latter he always received extra pay." And Bayley J. said, that it was "very like the case of a person employed to attend, as an occasional servant, for the purpose of brushing clothes." (5)

A stipulation, in order to come under the denomination of an exception, must be made at the time when the contract is made, and cannot be introduced into it afterwards. If by an agreement, after the hiring is completed, any portion of the year's service is to be taken away, such an agreement will amount either to a dissolution of the contract, or to a dis-

An exception cannot be introduced into the contract after the hiring is completed. It would then be

(1) *R. v. Macclesfield*, Burr. s. c. 458. See, in *R. v. Buckland Denham*, what is said by Aston J., Burr. s. c. 696.

(2) *R. v. Empingham*, Burr. s. c. 791.

(3) *R. v. Bishop's Hatfield*, Burr. s. c. 439.

(4) *R. v. Rushulme*, 10 East, 325.

(5) *R. v. Lydd*, 2 B. and C. 754.

a dispensation or dissolution. pension of the service according to the circumstances of the case. It cannot be an exception, unless it formed part of the original contract. (1)

It will not avail to urge that the cause, for which the interruption of the service is claimed, is a reasonable one; (2) for if it were so, it would excuse a *bonâ fide* absence from the service; (3) and it is therefore unnecessary to introduce such a stipulation into the contract.

Nor will it form any exception to the rule above laid down, that liberty of absence only was stipulated for, and no express time excepted out of the service; (4) nor that the absence depended upon a contingency; (5) nor that there was a covenant on the part of the servant to substitute an equivalent for such absence, as for instance, that he should receive no wages, (6) or that he should find a fit man to do his work, (7) or should make up the time lost during the year, by serving after it had expired. (8) The law is most strict in its interpretation of the contract. And the hiring must, in all cases, be such as to give the master dominion over the servant for one entire unbroken year, (9) from the time of making the contract. (10)

An exception makes the hiring vicious from the beginning.

The fault, being in the contract itself, which is vicious from the beginning, cannot be removed by what afterwards takes place in the performance of the service. The servant may or may not absent himself for the stipulated time. He may or may not take advantage of the liberty or exemption which the contract affords him. But he cannot, by thus abstaining to profit by the agreement, alter its original nature, or make that sound which is essentially defective. (11)

Difference between an exception and a condition. The latter only makes the contract a defeasible one.

And in this respect, an exception differs from a condition. The introduction of the former into the contract, vitiates it in toto; the introduction of the latter does but render it defeasible.

(1) See *R. v. Sulgrave*, 2 T. R. 376. *R. v. Market Bosworth*, 2 B. and C. 757.

(2) *R. v. Over*, 1 East, 599.

(3) See *R. v. Islip*, 1 Stra. 423.

(4) *R. v. Edmond*, 3 B. and A. 107.

(5) The 2nd stipulation in *R. v. Edmond*, 3 B. and A. 107.

(6) *R. v. Edmond*, 3 B. and A. 107.

(7) *R. v. Arlington*, 1 M. and S. 622.

(8) *R. v. Turvey*, 2 B. and A. 520.

(9) See *R. v. Rushulme*, 10 East, 325, and *R. v. Arlington*, 1 M. and S. 622.

(10) *R. v. Marton*, 4 T. R. 257.

(11) See *R. v. Althorpe*, 2 B. and C. 112. See the second stipulation in *R. v. Edmond*, 3 B. and A. 107, and note that in that case the servant did not take advantage of that clause in the agreement; yet it was held to be an exception which invalidated the hiring.

A condition is a stipulation by which the contract, upon the happening of a particular event contemplated by the parties, may be defeated or determined; the non-occurrence of which event leaves the parties standing in the relation of master and servant throughout the whole year.

Definition of a condition.

Thus, for instance, suppose that B. is hired to A. for a quarter of a year, and, if they like one another, then to continue for a year. (1) Now here a hiring for an entire year is entered into, subject to the contingency of the parties suiting one another. If they do not suit one another, then the event has happened which defeats or determines the contract.

Instances of conditional hirings.

And the same may be said of an agreement, under which B. is hired to go into A's service a month upon liking, and is to have 5*l.* a year wages. (2)

Of a similar kind are all stipulations for determining the service by notice or by what is deemed an equivalent for notice. As where power is reserved to the master and servant, to put an end to the service at a fortnight's notice, (3) or a month's notice, (4) or on payment of a month's wages. (5) And under the same head are to be ranged even those agreements, in which the master stipulates that he may at any time dismiss the servant for misconduct, without any notice at all. (6) The law sanctions these and all other stipulations in the contract by which the service may be determined or defeated, but not any by which the master's control is to be suspended, or by which the service may be interrupted and its entirety destroyed.

Difference between a condition and an exception.

Now the master's control is suspended, and the entirety of the service is broken in upon, by such an agreement as the following. B. is hired to serve in husbandry from Michaelmas in one year to Michaelmas in the next. If he and his master cannot agree for the harvest, he is to harvest for himself. The service, in this case, cannot continue for the whole year, unless after the original hiring a new bargain be made for the harvest month. There is not therefore any one hiring for a year. (7)

Instances of exceptive hirings.

If B. agrees to serve A. for three years at 1*s.* per day, when A. has work for him to do, such wages to be paid only

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- (1) *R. v. Lidney*, Burr. s. c. 1., and see *R. v. St. Ebbs*, Burr. s. c. 289.
 - (2) *R. v. New Windsor*, Burr. s. c. 19.
 - (3) *R. v. Birdbroke*, 4 T. R. 245.
 - (4) *R. v. Hampreston*, 5 T. R. 205.
 - (5) *R. v. New Windsor*, Burr. s. c. 19.
 - (6) *R. v. Sandhurst*, 1 Manning and R. 95.
 - (7) *R. v. Althorne*, 2 B. and C. 112.

made in favour of the master, is a condition; when made in favour of the servant, is an exception; and why.

There are two tests for determining whether the hiring is exceptive or conditional.

an exception. The case of *R. v. Byker*, is an authority to show that it is a condition, when stipulated for on the part of the master. But on the other hand, there appears to be also some authority for regarding such a stipulation as an exception, when it is made in favour of the servant. (1) And there is reason for the distinction. When it is made in favour of the master, that is, when he has the power reserved to him of suspending the service, it does not limit or abridge his control over the servant for the whole year. That remains unimpaired until the suspension takes place. Whereas, in the case of liberty of absence, stipulated for on the part of the servant, the master's dominion over the servant is, by the very contract, rendered incomplete.

From what has been here stated, it appears that there are two principal tests, by the application of which to the terms of an agreement between master and servant it may be ascertained whether the case does, or does not, fall within the class of Exceptive Contracts.

In the first place, we are to see whether, by the agreement, the control of the master is suspended during any portion of year; or, which is the same thing, whether any portion, however small, of that time, which in law belongs wholly to the master, is placed at the servant's disposal.

In the next place, whether in addition to the original contract, any further agreement is necessary in order to secure to the master a full year's service on the part of the person hired. (2)

If the control of the master does not run through the whole year; or if any thing further is to be done between the parties in order to make the service continue throughout the year; in either of these cases, the hiring is an exceptive hiring.

If the master's control over the servant is by the original agreement complete; and if no further bargain is necessary to entitle him to a year's service from the person hired, the hiring is then a conditional hiring.

It must be confessed that the two cases, commonly known as the militia men's cases, (3) are not to be reconciled with what is here advanced. In the first of them, there was a stipulation of absence in case of being called upon to serve in the militia. In the second, for a stated absence of one month on account of being in the militia. Lord Kenyon says, that "the case of the militia man went altogether upon

(1) See p. 14, the second stipulation in *R. v. Edgmond*, 3 B. and A. 170.

(2) See p. 13, *R. v. Althorne*, 2 B. and C. 112.

(3) *R. v. Westerleigh*, Burr. s. c. 753, and *R. v. Winchcomb*, Doug. 391.

the ground that the leave of absence stipulated for was no other than what the law would have compelled without any such stipulation. (1) Lord Ellenborough was of opinion, that perhaps it may be the best thing to say of them, that they are to be considered as exceptions. (2)

Fifthly. Not only must time form a part of the contract, but it must be the essential and substantial part of it. If, therefore, one engages to serve only until a particular job be done, the introduction of time into the agreement is wholly irrelevant; and although it should appear that he who contracts to perform the job was expressly hired for a year, such hiring is to be disregarded, and the substance of the agreement alone to be attended to. (3) On the other hand, he may be said to be hired for a year, who is, by the terms of the contract, hired for that period of time, not to perform any particular finite job, but to work, generally, at a trade or business, and to be paid by the piece. (4) For the law will imply that for this purpose the servant or workman must be under the power and controul of the master.

The principal rules which govern express contracts of hiring have been here laid down; and, with a view to distinctness, these hirings have been divided into general hirings, or those wherein no time is mentioned, and specific hirings, where the time of service is specified and expressed. It only remains to add three rules, which are applicable to both these species of hirings, that is, to all express hirings whatsoever.

The first is, that the hiring may be a conditional one; as, for instance, where B. is hired to go into A.'s service, a month upon liking, and is to have 5*l.* a year wages; (5) or where he is hired to A. for a quarter of a year, and if A. and B. like one another, then to continue for a year, (6) or to continue at 20*s.* a year. (7) These hirings are good. For a conditional hiring is a hiring for a year, provided the condition be performed.

The second rule is, that in the hiring there may be an agreement to determine the service by notice, or what is deemed an equivalent for notice; and such agreement will not make the contract bad. As where power is reserved to

Time must be the substance of the contract. Engaging to serve until a job be done is not sufficient, although the person be expressly hired for a year. But being hired for a year to work by the piece is a sufficient hiring.

The hiring, whether general or specific, may be a conditional one,

and may be determinable by notice, or an equivalent for notice.

(1) In *R. v. Over*, 1 East, 601.

(2) In *R. v. Beaulieu*, 3 M. and S. 229, and see also his further remarks there on those cases.

(3) *R. v. Woodhurst*, 1 B. and A. 325.

(4) *R. v. King's Norton*, Burr. s. c. 152; *R. v. Birmingham*, Doug. 333; *R. v. Burbach*, 1 M. and S. 370.

(5) *R. v. New Windsor*, Burr. s. c. 19.

(6) *R. v. Liduey*, Burr. s. c. 1.

(7) *R. v. St. Ebbs*, Burr. s. c. 289.

the master and servant to put an end to the service on a fortnight's notice, (1) or a month's notice, (2) or on payment of a month's wages; (3) this contract, though defeasible, is a good one. Whenever, therefore, we find it laid down in the books, that the contract must be an absolute one, (4) we are to understand this term in a qualified sense, and not in its usual meaning, as contradistinguished to defeasible. And Lord Ellenborough, in *R. v. Beaulieu*, 3 M. and S. 229, where he says that "the hiring must be an *absolute, unqualified, indefeasible* hiring," explains what he means, by adding, "that is, a hiring by which the party who hires himself has the power of communicating to the master an absolute right to his service for the whole time."

The relation created must be that of master and servant.

The third rule, which applies to all express hirings, general as well as specific, is this, that the relation created between the parties must be that of master and servant. Therefore, an apprenticeship, which, from some informality, is void for the purpose of conferring a settlement, cannot be considered as a contract of hiring and service. (5) And if two parties merely agree that one shall *teach* the other, without any undertaking on the part of the latter to *serve*, this is not such an agreement as shall enure to give a settlement. (6) Or, if the relation constituted between the parties be merely that of master and workman, as where the latter engages to work by the piece, and does not *expressly* hire himself *for a year*, such a contract is insufficient to bind the workman for the space of a year, and therefore not a good hiring under the statute. (7) In *Rex v. Wrington*, Burr. s. c. 280, the Court made a distinction between a *labourer* and a *servant*, and held that they were not *services ejusdem generis*. But this, perhaps, is not, generally speaking, a just distinction, for a *labourer* may be a *servant in husbandry*.

No alteration, when the hiring for a year is once completed, can prevent its enuring to give a settlement,

In concluding the subject of express hirings, I will just observe, that when the contract for a year's service, whether by a general or a specific hiring, is once completed, no variation introduced into it at a subsequent time can destroy its effect in relation to a settlement.

(1) *R. v. Birdbroke*, 4 T. R. 245.

(2) *R. v. Hampreston*, 5 T. R. 205; *R. v. Great Yarmouth*, 5 M. and S. 114.

(3) *R. v. New Windsor*, Burr. s. c. 19.

(4) *R. v. Buckland Denham*, Burr. s. c. 696.

(5) *R. v. All-Saints*, in Hereford, Burr. s. c. 656; *R. v. Margram*, 5 T. R. 153.

(6) *R. v. Bilborough*, 1 B. and A. 115.

(7) See note (4), p. 17.

Suppose, for instance, that A. hires B. in such a manner that the hiring is a general one, and that a week afterwards A. says to B., "I have hired you, but mentioned no time, remember you are hired for fifty-one weeks :"(1)

Or, suppose that A. hires B. specifically for a year, and three or four days afterwards asks him whether he will consent to the hiring being for fifty-one weeks, and that B. consents to this : (2)

In both these cases the contract is concluded before the alteration is proposed. And there being once a good and valid hiring for a year, a settlement will be gained, provided all other requisites are complied with.

Next, of implied contracts of hiring. An implied contract is a contract to be inferred, as a fact, from other independent facts or circumstances, which naturally and properly lead to a conclusion that a contract was made, although the direct means of establishing it are no longer in existence. (3)

With regard to the facts or circumstances which properly lead to such a conclusion, they must be for the exclusive consideration of those who have to decide upon the facts of every case. I shall postpone my inquiry into the nature of these circumstances, until I come to treat of the subject of evidence. In the mean time I shall only observe, that three cases may be supposed, in which this inference of a contract may be drawn : 1. Where there has been no previous contract between the same parties ; 2. Where there has been a previous contract of hiring for a year, and that contract has been performed ; 3. Where the original agreement was for some period less than a year, and after the expiration of that time a continued service, without any new agreement, is found to have existed. In each of these three cases, if the circumstances are such, that any agreement can be inferred between the parties, such implied agreement will have all the legal effects and properties of an express one ; that is, if the hiring implied is a hiring for a year, it will confer a settlement ; if it does not amount to a hiring for a year, it will not confer a settlement.

For the purpose of gaining a settlement, it is, in all cases, necessary that, at the period to which a constructive hiring for a year is to be referred, the party hiring himself should have been capable of making the contract ; that is, he must

provided all other requisites for gaining a settlement are complied with. Definition of an implied contract of hiring.

Three cases in which a contract of hiring may be inferred.

1. The case of no previous contract ;
2. The case of a previous contract for a year ;
3. The case of a previous contract for less than a year.

(1) *R. v. Market Bosworth*, 2 B. and C. 757.

(2) *R. v. Fillongley*, 1 B. and A. 319.

(3) I believe I have borrowed this definition from Mr. Starkie's book on Evidence.

have been at that time unmarried, without children, and free from every other disability which would prevent the contract from enuring to confer a settlement; for an implied contract cannot be of greater force than an express one.

Of the service
for a year.

II. Thus much of the contract itself, of the parties to it, and of the conditions under which it must be made. Next, as to the performance of it; or, in other words, as to the second principal requisite to gain a settlement, I mean a service for a year; termed, in the statute, (1) a continuing and abiding in the same service during the space of one whole year. (2) Upon which words the following constructions have been put: 1. That it is not necessary that the whole service for a year should be under the hiring for a year; for "if there be a hiring for a year and a service for a year, though but a small part of the service were performed under the yearly hiring, a settlement will be gained;" (3) provided the hiring, under which the settlement is claimed, were made when the servant was unmarried: (4) 2. That this service, however, must be an entire service for a year, without any such break or interval as in law will be considered a discontinuance or interruption of the same: 3. That the person hired must abide, if not actually, at least constructively, in the same service for the space of a year.

It may be
made up of
several hir-
ings;
of a weekly
hiring and a
yearly hiring;

I. It is not necessary that the service for a year should be under the hiring for a year. It may be made up of several hirings. Thus, for instance, if B. is hired at Michaelmas as a weekly servant, and at Christmas enters into a contract with his master to serve him for a year, and continues under that contract till the Michaelmas following, he has, in the whole, been hired for a year, and served for a year, and is therefore entitled to a settlement. (5) And even if B., in this case, had not been hired for a year until a few days before the end of the year, the conclusion would not be varied; (6) though, indeed, it was once thought that the servant ought, under such hiring, to serve forty days. (7)

(1) Stat. 8 and 9 W. 3. c. 30, s. 6.

(2) A servant who is hired from Whitsuntide to Whitsuntide, and who remains in that service from the 21st of May, in one year, to the first of June in the next year, has abided in the service for a *whole year*, though the day on which he leaves the service is three days before Whitsuntide. *R. v. Ulverstone*, 7 T. R. 564.

(3) Per Lord Kenyon, C. J. in *R. v. Sutton*, 1 East, 656.

(4) *R. v. Great Chilton*, 5 T. R. 672.

(5) *R. v. Sutton*, 1 East, 656; and see in that case the remarks which Lord Kenyon makes upon the case of *R. v. Wrington*, Burr. s. c. 280.

(6) *R. v. Adson*, 5 T. R. 98.

(7) In *Brightwell v. Westhallam*, 4 Burn, 395.

And the law is the same in whatever order the hirings take place. For if B., in the first instance, hires himself for a year, and afterwards, that contract being abandoned, enters into a new one for a shorter period, (1) he may still gain a settlement by that service, provided he was unmarried at the time when the first contract was abandoned, and the second contract entered into. (2)

The instances here given are instances of serving under several hirings. But the whole service may be made up of a service under a yearly hiring, and a service under no hiring at all; or, as expressed by Lord Ellenborough, "a service without a contract may be coupled with a service under one." (3)

Suppose that B., in the month of May, when he is still under his indentures of apprenticeship, hires himself to A. for a year. Now, at this time he is clearly not *sui juris*, and therefore incompetent to make the contract. His indentures expire in September. From that period, till the month of May, suppose him to continue in the service without any fresh hiring; that is, he is serving for eight months without a contract. In May he hires himself again for a year, and continues in the service four months. By this service he has gained a settlement. (4)

And observe, that in this case no part of the year's service was performed while the indentures of apprenticeship remained in force.

And if B. had served A., in the capacity of apprentice, from May to September, such service could not be coupled with any subsequent service as a hired servant. (5) For the two services, in order to be coupled, must be services in the capacity of a *servant*; and, therefore, not only the service of an apprentice, but also the service of a workman, merely as such, is not such a service as satisfies the intention of the statute; and this, perhaps, is the real meaning of the doctrine, that services, in order to be coupled, must be *ejusdem generis*. (6)

or of a yearly hiring, and afterwards a weekly hiring, provided all these hirings took place at the time when the servant was unmarried. Or the service may be partly without a contract, and partly under a yearly hiring.

(1) *R. v. Grendon Underwood*, 2 Bott, 264; *R. v. Fillongley*, 1 B. and A. 319.

(2) See note (4) p. 20. The case of *R. v. Great Chilton*, 5 T. R. 672, which establishes this doctrine, does not say that the second hiring must be according to the statute. It requires a conformity to the statute in one particular only, that of the person hired being unmarried. Lord Kenyon differed from the other judges.

(3) In *R. v. Dawlish*, 1 B. and A. 281.

(4) *R. v. Dawlish*, 1 B. and A. 280.

(5) *R. v. St. Mary, Kidwelly*, 2 B. and C. 750.

(6) *R. v. Wroughton*, Burr. s. c. 280, for in that case part of the service was said by the Court to have been performed in the capacity of a *labourer*. See page 18, third rule, as to contracts of hiring.

The service must be one continued service.

The service is continued in law,

if the abandonment of the service and the return to it both take place in the same day.

2. The next rule, by which the first must be guarded, is, that the service must be an entire service for a year, without any such break or interval as in law will be considered a discontinuance or interruption of the same; by which is meant, that, in order to connect and couple several hirings, there must be one continued service.

Now, the service may be determined, abandoned, or interrupted in fact, and yet, in the contemplation of law, may continue to subsist. It therefore becomes necessary to see in what cases a service, which is relinquished in fact, may be so re-adopted, that the interruption will be overlooked in law. And, in all cases where this doctrine prevails, it is upon the well-known rule of law, that there is no fraction of a day. Therefore, if B. is hired to serve from Christmas to Michaelmas, it seems, that on Michaelmas day, he is at liberty to leave his master's service in fact, provided he returns to it on that day under a new contract. The law, finding him in his master's service at some one moment of that day, and finding him also there on the preceding and following days, will take no cognizance of such actual absence and relinquishment, but will imply a virtual continuance in the service. Nor is it necessary that such servant should have served in fact prior to such discontinuance in fact; for, suppose that B., the servant, is hired from Michaelmas to Michaelmas, and that A., the master, dispenses with his service till the Wednesday after Michaelmas day. On the Wednesday he goes to his master's; but the master wishing B. to serve in a different capacity from that in which he was hired, B. refuses to do so; and thereupon it is agreed between them that B. is at liberty to hire himself to any other person. B. goes away, but on the same day again meets A., and agrees to serve in the manner A. had desired. (1) Now, here B. renounced his contract, and A. agreed that it should be dissolved. But as all the above circumstances took place within the space of a day, they are overlooked by the law, which does not condescend to notice these minuter portions of time.

If, in either of the above cases, B. had been absent a whole

(1) *R. v. Grendon Underwood*, 2 Bott, 264. And see the case of *R. v. Wintersett*, 2 Bott, 263, which it seems at first sight difficult to reconcile with *R. v. Grendon Underwood*. In *R. v. Wintersett*, the servant was absent the first month of his engagement, from illness. The contract which Buller J. says, under these circumstances, was only an *executory* one, was dissolved by consent, and a new one entered into, under which the servant lived out the year contemplated by the first engagement. It was decided that the month's absence was not to be accounted as part of the service.

day, (1) the continuance of the service could not have been implied, notwithstanding the master's consent to receive him into his service again; but the act of B. would have amounted in law, as well as in fact, to a relinquishment of the service; for the first contract being dissolved, and there occurring an interval of time, such as the law will recognise, between the service under that contract and a service under a subsequent one, the two services cannot be coupled; and no act of the master, in taking the servant back again, can convert an interval of absence, under such circumstances, into a virtual or constructive service; for that can only be effected, as will hereafter appear, where there is a subsisting contract between the parties. (2)

3. The third rule, with respect to the service, is, that the person hired must abide, if not actually, at least constructively, in the same service for the space of a year.

A constructive service takes place where the person hired has been absent from the service, or has served another master, for some portion of the year; but under such circumstances that the contract of hiring is not thereby determined or dissolved.

First, a person abides constructively in the same service for a year, who is absent during any part of that time for a reasonable or justifiable cause. As to what shall be deemed a reasonable or justifiable cause, it is not easy to lay down any general rule, which shall be a criterion in all cases. A few instances will, however, show the nature of the excuse or justification for such absence on the part of the servant.

And first, suppose that B., being hired at Michaelmas, falls ill, and is therefore unable to go into his place for some time; the master is bound to receive him when he recovers, and he must be taken to be all the while in the master's service. (3) This is, without doubt, the case where B. is absent from illness at any other period of the service, either in the middle (4) or the end of it. (5)

Suppose next, that B. makes a reasonable request to his master; as, for instance, that his master will give him per-

The service may be a constructive service.

Definition of a constructive service.

A person serves constructively, who is absent for a reasonable or justifiable cause.

As by reason of illness.

Or for a reasonable purpose.

(1) See *Wickford v. Bretford*, Forts 311, which case is said by Ashurst, J., in *R. v. Greudon*, 2 Bott, 264, to have been determined on this ground. See also *R. v. Caverswall*, Burr. s. c. 461.

(2) See, on the subject of Dispensation, p. 27.

(3) See *R. v. East Shefford*, 4 T. R. 804, that absence at the beginning, the middle or the end of the year, may be dispensed with, either by the consent of the master, or for an excusable cause. See also *R. v. Hanbury*, Burr. s. c. 322, that the servant is a servant from the time of hiring. The case of *R. v. Winterset*, stated in note (1), p. 22, does, it must be confessed, appear to be contrary.

(4) *R. v. Islip*, 1 Stra. 423; *R. v. Sharrington*, 2 Bott, 322.

(5) *R. v. Christchurch*, Burr. s. c. 494, and *R. v. Maddington*, Burr. s. c. 675.

mission, a few days before the expiration of his service, to go to a fair to hire himself into another service : the master refuses, and B. goes without his consent ; this absence is no interruption of the service, for the law will not suffer a master to deny his servant a reasonable request. (1)

A person serves constructively, who, after a wrongful absence, is taken back by the master ;

Secondly, he is said to serve constructively, who, after an absence, from whatever cause, how unreasonable or unjustifiable soever it may be, is received again by his master. It may be a wrongful act, and breach of duty on the part of the servant ; but the act of the master in taking him back again, purges, as it has been termed, every such offence.

B. is hired at Michaelmas, but, without any sufficient cause, neglects to go into his service till three days afterwards. He quits the service finally the Michaelmas following, but in the meanwhile, is absent on several occasions, and for two or three days at a time. The master, however, always receives him again. Now, here B. is not actually in service from Machaelmas to Michaelmas, but he is constructively so for the whole time, because the master's receiving him again, purges, or rather gives a sanction to his absence, which sanction has all the effect of a previous permission. (2)

Or who is absent by reason of any act of the master,

the master either giving him permission to be absent, or obliging him against his will to discontinue the service.

In all these cases the contract must remain on foot, and not have been dissolved.

Of the dissolution of a contract of hiring.

Thirdly, he is said to serve constructively, who is absent from the service by reason of any act of the master.

Now, the acts of the master may be either rightful or wrongful acts. He either gives the servant permission to absent himself during part of the service, or obliges him, by some act of authority or violence, to discontinue it against his consent. In each of these cases, if the absence continues to the end of the term of service, it is said to be a dispensation with the service ; and the question, in all such cases, will be, whether the transaction between the master and servant did or did not amount to a dissolution of the contract. If the contract remains on foot, that is, if the relation of master and servant can be said to continue, and the master does nothing but forego the benefit of actual service for part of the time, it is a dispensation on the part of the master, and a constructive service on the part of the servant.

It is necessary, therefore, to see by what means the contract may be dissolved, and the relation of master and servant put an end to.

And I must here observe that I am now speaking only of parol agreements, these being the most usual agreements between master and servant. An agreement by deed must be

A contract by

(1) *R. v. Islip*, 1 Stra. 423 ; *R. v. Polesworth*, 2 B. and A. 483.

(2) *R. v. Hanbury*, Burr. s. c. 325 ; and see *R. v. Islip*, 1 Stra. 423.

discharged by deed, and can be discharged in no other way. If, therefore, in the case of a service under a deed, which is called a covenant service, the parties separate with the intention that the contract should be put an end to, it cannot be a dispensation with the service, because a dissolution was the thing intended, and the rule of law prevents its operating as a dissolution of the contract. The servant does not, in this case, gain a settlement, for he has omitted to abide either actually or constructively in the service. (1)

deed must be discharged by deed.

That the object of this inquiry into the state of the contract may be more clearly seen, we are to consider, in the first place, what is the difficulty to be solved. The difficulty is this: B. having engaged to serve A. for a year, does not remain with him the whole of that period, but is absent, we will suppose, the last month. This absence is not from sickness, or for any other reasonable cause mentioned under the preceding heads. It is not, we will suppose, an absence through his own wrongful act; such, for instance, as the being detained in custody, (2) or the being sent to Bridewell. (3) In these cases, it is his own act which renders him incapable of completing his service; and if such detention occurs at the end of the service, or if, occurring in the middle, the master does not afterwards receive him, his year's service cannot, by any construction of law, be considered as performed.

The absence, not being of such a nature, is therefore an equivocal act, capable of explanation; and it can only be explained in one of two ways; either that the contract by which B. engaged to serve a year was determined; or that, the contract remaining on foot, the month's service was dispensed with. Whatever then, upon this supposition, does not amount to a dissolution of the contract, is a dispensation with the service.

With regard to a dissolution of a parol contract of hiring, such a contract may be dissolved in four ways; first, by the consent of both the parties; second, by the election and act of one of the parties having a justifiable cause of complaint; third, by a justice of the peace, under the authority of acts of parliament; fourth, perhaps by the wrongful absence of the servant, up to the expiration of the term of service.

A parol contract of hiring may be dissolved in four ways:
1. By consent:
consent a question of fact.

With regard to the first, the consent of the parties, it is a question of fact how far such consent has been actually or impliedly given.

(1) *Powlett v. Burnham*, 2 Bott, 300.
(3) *R. v. North Cray*, 2 Bott, 322.

(2) *R. v. Westmeon*, 2 Bott, 320.

2. By the election of one party having a sufficient cause of complaint.

With respect to the second, namely, the act of one of the parties having a justifiable cause of complaint, (1) it must be remarked that in settlement cases the question usually arises upon the misconduct of the servant, and therefore I will so consider it, though, without doubt, the rule is correct as stated above.

These cases of misconduct on the part of the servant divide themselves into three heads: they are either instances of misconduct, where the servant does not absent himself from the service, or they are instances of misconduct, where he absents himself only for a certain time, and not up to the expiration of the term of service; or they are instances of misconduct, where he does absent himself up to the expiration of the service.

Now, on the two first suppositions, which are the only ones we have now to consider, it is undoubtedly in the power of the master to overlook the offence, or to sanction the absence by taking back the servant. (2) The wrongful act of the servant does not of itself put an end to the contract; it only gives a right to the party aggrieved to do so, if he thinks proper: it is a ground for dissolving the contract, and a good cause of discharge from the service. (3) If the master chooses to act upon this right, which the misconduct of the servant gives him, then is the contract legally dissolved between them, just as much as if the free consent of both parties had been given for the purpose. (4)

3. By a justice of peace.

A third mode of dissolving a parol contract of hiring, is where a justice of the peace, under the authority of acts of parliament, discharges the servant.

I shall not discuss this subject at large, but shall content myself with observing, that these Acts of Parliament (5) confine the power of the magistrates to cases where a complaint has been made against the servant; and that the discharge by a justice must be given under his hand and seal. Of the same nature is a dissolution of the contract, effected by an order of removal, which, however wrongfully, separates the servant from the master, and which remains unappealed against. It is said, that the return of the servant, under these circumstances, would be an illegal act. (6)

(1) See in *R. v. Polesworth*, 2 B. and A. 483, what is said by Abbott, C. J.

(2) See in *R. v. Kenilworth*, 2 T. R. 598, what is said by Buller, J.; *R. v. Barton upon Irwell*, 2 M. and S. 329.

(3) See *R. v. Barton upon Irwell*, 2 M. and S. 329.

(4) *R. v. Brampton*, Cald. 11; *Spain v. Arnott*, 2 Stark. N. P. 256.

(5) Stat. 20 G. 2. c. 19; stat. 4 G. 4. c. 34.

(6) *R. v. Kenilworth*, 2 T. R. 598, but quære, whether the servant, in this case, returned in a state of vagrancy? He could not gain a settlement, because there was no hiring after his return. See *R. v. Fillongley*, 2 T. R. 709.

A fourth mode, by which a contract of hiring may be dissolved, is, by the wrongful act of the servant in absenting himself from the service up to the expiration of the term. Whether the master has or has not an opportunity of taking back the servant, can make no difference in the conclusion of law. If the law finds that the master did not, in fact, take him back when he might have done so, and nothing passes between them, it will conclude that the master left the servant to the consequences of his own act. (1) And if the master had no such opportunity afforded him, as where the servant is detained in custody for his offence, up to the end of his year, (2) it then pronounces the contract at an end, *ipso facto* determined and dissolved by the misconduct of the servant. And it does so for this reason, that it cannot suppose the contract to subsist without a service, either actual or constructive, under it. In this case there is no actual service, and no ground or pretence for raising a constructive one. But in the case of an imprisonment under the statute 20 Geo. II., c. 19, s. 2, upon the complaint of the master, the servant is still to be considered as virtually in the master's service; for that statute gives the justice, before whom the complaint is lodged, power to put an end to the contract; and if that is not done, the contract still subsists. If, therefore, the imprisonment be for the last month of the year, the servant, in this case, gains a settlement. (3)

I shall only further observe, upon the subject of dissolution, that, since these are the only modes by which the contract may be put an end to, it is clear that any change in the master's circumstances, such, for instance, as bankruptcy (4) or leaving his farm; (5) such an event, I say, cannot, of itself, operate a dissolution of the contract. Even the death of the master has been held not to produce this effect. (6)

This digression, on the mode of dissolving the contract, will enable us to determine in what cases the service was only dispensed with; for, to repeat what has been already advanced, if the servant be absent, as I have supposed, the last month of his year, and the particular circumstances of the case do not tend to show a dissolution of the contract, then a dispensation with the service will be necessarily inferred.

The question—whether dispensation or no dispensation, is in general a question of fact, to be determined by the good

4. By the wrongful absence of the servant, to the end of the stipulated time of service.

But imprisonment under stat. 20. G. II. c. 19, does not dissolve the contract. And why.

There is no other mode by which the contract can be dissolved. Neither the master's bankruptcy, nor his leaving his farm, nor his death, will put an end to it. Of dispensation. That which does not amount, to a dissolution of the contract, is a dispensation with the service.

(1) *R. v. Westmeon*, 2 Bott, 320.

(3) *R. v. Hallow*, 2 B. and C. 739.

(5) *R. v. Ivinghoe*, 1 Stra. 90.

(2) *R. v. North Cray*, 2 Bott, 322.

(4) *R. v. St. Andrew's*, Holborn, 2 T. R. 627.

(6) *R. v. Ladeock*, Burr. s. c. 179.

Dispensation,
a question of
fact.

sense and judgment of those to whom the law has committed, exclusively, the determination of matters of fact. They will have to decide, upon proof of what passes between master and servant, whether the absence on the part of the servant was by a previous permission, or a subsequent sanction, or occasioned by some act of violence on the part of the master; whether it was for a reasonable cause which the master should have allowed, or a justifiable cause to which he should have yielded. And if they find any one of these facts in the affirmative, they will then justly conclude, that the service was so far dispensed with, and that the servant, notwithstanding the absence, was constructively and virtually serving his master.

A person
serves con-
structively
who serves
another with
his master's
consent, or
who serves the
master's exe-
cutor, &c., for
such service
is one and the
same service.

Lastly, he is said to abide constructively in the same service, who serves another with the master's consent; (1) or who, after the death of his master, continues with his personal representative for the remainder of the year. (2)

Instance of a
service which
is not one and
the same.

But a service under the following circumstances cannot be regarded as one and the same service: B. goes, at the request of J. S., who is waiter at an inn, to help him while he is ill, and continues in that capacity for six months; at the end of which time J. S. goes away, and then B. continues to serve in the inn of A., the master, for another six months: this last service cannot be coupled with the first, for the first was a service with a different master. (3)

The servant
of a toll-col-
lector gains
no settlement.

By such actual or constructive service, the person hired is enabled, in general, to gain a settlement, provided he fulfils the only remaining condition, that of residence. But there is one case, in which the completion of all these requisites will not produce that effect; it is the case of the master being a toll-collector, whose servant is, by statute 3 Geo. IV., c. 126, incapacitated from gaining a settlement in any parish whatsoever. (4) With this exception, there seems to be no service in which the party, if *bonâ fide* hired as a servant, may not gain a settlement. As the servant of a public institution, like the Military College at Sandhurst, he may gain one. (5) And in all cases the question is not *by whom* the servant is hired, but whether he is lawfully hired, and performs a year's service under that hiring. (6)

The servant
of a public in-
stitution may
gain a settle-
ment.

III. A servant who has been duly hired, and has duly served conformably to the rules above laid down, is settled in

(1) *R. v. Beccles*, 2 Bott, 294; and see *R. v. Ivinghoe*, 1 Stra. 90.

(2) *R. v. Ladock*, Burr. s. c. 179.

(3) *R. v. St. Matthew's*, Ipswich, 3 T. R. 449.

(4) Chap. I. page 3.

(5) *R. v. Sandhurst*, 1 Manning and R. 95.

(6) 1 Manning and R. 102.

that parish, where, within the compass of a year, he has last completed a residence of forty days; provided such residence was with a view to the service, and not *diverso intuitu*; provided he has had, during some part of the service, the character of a yearly servant in that parish; and provided neither himself nor his master were residing in that parish under a certificate.

Of the residence.

This is the rule; in order to understand which the more clearly, we will examine its separate parts. They are these: 1. That this residence of forty days is necessary, in order to gain a settlement, and to fix the place of it; 2. What is to be understood by the servant's having last completed a residence of forty days; 3. How it is that such residence must be within the compass of a single year; 4. That the residence must be with a view to the service, and not *diverso intuitu*; 5. That he must have, during some part of the year, the character of a yearly servant in that parish; 6. That neither his master nor himself were, during any part of the forty days, residing in that parish under a certificate.

1. This residence of forty days is necessary in order to confer a settlement, and to fix the place of it.

It seems proper, in this place, to show the reason why a residence of forty days is required to complete all settlements acquired in the party's own right.

A residence of forty days is necessary.

This period of forty days was fixed by the statute, 13 and 14 Car. 2. c. 12., which directs that all persons, subject to removal, should be removed to the place where they had last inhabited by the space of forty days, in the capacity of native, householder, sojourner, apprentice or servant. If therefore a person, coming under any one of these denominations, had resided in any parish for forty days, and that was the parish where he had last inhabited for forty days in any capacity pointed out by the statute, that was the parish to which he might properly be removed, or which, in other words, was the place of his settlement. If there was no parish in which he had, while in such capacity, resided for forty days, he could not, while in such capacity, have gained any settlement at all. Thus we see how it is that the residence of forty days is necessary to complete the settlement and to fix the locality of it.

This period is fixed by the statute 13 and 14 Car. 2. c. 12.

But the statute confining itself to settlements which are gained in the party's own right, and making no mention of others, this rule as to residence is therefore limited to the first; while other settlements are left without any regulation of the sort, and from their nature and the reason of the

This rule as to residence is confined to settlements gained by the party, in his own right.

thing, as will hereafter appear, are capable of being instantaneously acquired.

Now, to apply this rule respecting residence to the particular case of a servant; a servant may by possibility have been hired for a year, and have served a year, and yet have gained no settlement. For suppose the master to be traveling throughout so much of the year, that the servant shall not have slept forty nights in any one parish: it is clear that in this case no settlement is acquired. From which consideration we may understand the force and virtue of a forty days' residence. The hiring and service give an inchoate claim: the residence consummates the right, and determines the particular place in which it is to be enjoyed.

2. We are to consider what is to be understood by the servant's having last completed a residence of forty days.

The forty days need not be consecutive.

Suppose that the servant abides thirty nine days in C. parish, then forty days in D. parish, and afterwards the last day of his service in C. parish; in which does his settlement lie? In C. parish. For it is not necessary that the forty days should be consecutive, (1) "and it was in C. parish that he last completed the requisite space of forty days." (2) But this rule is to be limited by another. For,

They must be within the compass of a year.

3. The residence of forty days must be within the compass of a single year.

Suppose the servant has lived with his master for 20 years, and has slept twice in every of such twenty years in the parish of C., and is in that parish the last night of his service; will his settlement be in C.? No; for it would not be expedient or reasonable. There must be some limit. And the Court of King's Bench have wisely laid it down, as the rule, that the 40 days' residence must be within the compass of a single year. (3)

But need not be under the same yearly hiring.

It is not, however, necessary that the residence, though it must be comprised within the space of a year, should be under the same yearly hiring. Therefore a servant, who, up to the 2nd of April, 1813, had resided thirty eight days in a parish, having resided in that same parish two days, and more, after the 2nd of April in the preceding year, was held to have clearly acquired a settlement there, although in each year he resided under different yearly hirings. (4)

The residence

4. The residence must be with a view to the service, and

(1) *R. v. Greenwich*, Burr. s. c. 243.

(2) *R. v. Lowess*, Burr. s. c. 825; *R. v. Hulland*, Doug. 656.

(3) *R. v. Denham*, 1 M. and S. 221; *R. v. Flambro'*, 1819, cited in 4 B. and C. 93.

(4) *R. v. Findon*, 4 B. and C. 91.

not *diverso intuitu*. That is, it must be a residence adopted by the servant while in the performance of the service.

must be with a view to the service.

And here it is to be remarked, that we are to look to the servant's abode, and no regard whatever is to be paid to that of the master. For by a residence of forty days, is meant the abode or resting place of the servant for that space of time, the place where he passed forty nights, *ubi pernoctavit* for that period. (1)

It was at one time supposed that the settlement was confined to the parish in which the hiring took place. But this notion was very early exploded. (2) Other questions were also made as to residence; as, first, whether it was necessary that the servant should live in the same parish with his master; (3) or, secondly, in the parish where his master had a settlement. (4) But all these questions are now set at rest; and the result of the decisions is that, in whatever parish the servant resides, he will gain a settlement there, (5) provided such residence be with a view to the service.

A servant is residing in a parish with a view to his master's service, if he is there by his master's permission for any length of time, working for himself. For the performance of the service, may be a constructive performance.

But if he be not serving his master, either actually or constructively; as for instance, if he be taken ill and go home to his family, his residence with them will not give him a settlement in their parish. For he was not there with a view to his master's service; but *diverso intuitu*, in order to recover from his illness.

5. The servant must have, during some part of the year, the character of a yearly servant in that parish. In other words, some part of the service, while he is living in that parish, must be under a yearly hiring. (6)

The residence, or some part of it must be under a yearly hiring.

The reason of which rule is, that the parish into which a servant comes, having been by the statute of 1 James II., c. 17, s. 3, protected against his gaining a settlement there, unless he gave notice in the manner directed by that statute, and a yearly hiring being afterwards, by the statute 3 and 4 W. and M. c. 11, s. 7, substituted for that notice; the parish,

The reason of this rule.

(1) See *R. v. Mildenhall*, 3 B. and A. 374. (2) See *R. v. Ashton*, 2 Bott, 273.

(3) *St. Peter's in Oxford, v. Chipping Wycomb*, 1 Stra. 528; *R. v. East Isley*, Burr., s. c. 722; *R. v. Hedsor*, 2 Bott, 287; in which last case the master did not even know the place of the servant's residence.

(4) *Bishop's Hatfield v. St. Peter's in St. Alban's*, 2 Bott, 276.

(5) *R. v. Bath Easton*, Burr. s. c. 776, the case of a servant going with his master to a public watering place. In that case Lord Mansfield says, that if *R. v. Alton*, Burr. s. c. 418, decides the contrary, it is wrong.

(6) *R. v. Apethorpe*, 2 B. and C. 895. See what is said by Holroyd J. in that case.

I say, into which a servant comes being still entitled to notice, or to an equivalent for notice, is still protected against a settlement being gained by any one who has not fulfilled the condition of law; that is, who has not been hired into that parish for a year. Now a servant who comes into the parish under a yearly hiring, although that yearly hiring took place elsewhere, is held to be hired into the parish for a year. But if he be not at any period of his residence a yearly servant, he can by no construction of law be deemed to have given the parish notice of his claim to a settlement there.

Neither the master nor the servant should be during any part of the forty days a certificated person. Definition of a certificate.

6. The servant cannot gain a settlement in any parish, in which his master or himself are, during any part of the forty days, residing under a certificate. (1)

A certificate is an acknowledgment in writing, made on the part of any parish, that the persons therein named or described are its parishioners. (2)

The particular forms to be observed, in order to render this a valid instrument, will be hereafter mentioned. (3) At present we have only to consider the extent and operation of a certificate, as to the persons included in it.

Any person included in a certificate is a certificated person from the time when the certificate was delivered to the parish.

Of the persons included in a certificate.

A certificate takes effect by being delivered to the parish for which it was intended, and into which the party removes, whose settlement is thus acknowledged. It is the delivery which makes him a certificated person. Consequently before delivery, he, his servants and apprentices, are free from all such restrictions as would, after delivery, prevent their gaining a settlement there. (4)

Next, as to the contents of the certificate. And

1. Suppose the certificate is to this effect. "We, the churchwardens, &c., do certify, &c., that A. is an inhabitant legally settled in our parish." This form of certificate covers not only A. but his family; that is to say, his wife, whether the one he has at the time, or one of a second marriage; (5) and his children, whether of the first or second marriage, (6) till they become emancipated, (7) and whether those children are born before or after the certificate granted. (8)

2. Next suppose the persons mentioned in the certificate are A., and C. D. E. his children, omitting B. who is one of

(1) Stat. 12 Ann. stat. 1. c. 18, stat. 9 and 10 W. c. 11.

(2) Stat. 8 and 9 W. 3. c. 30. s. 1.

(3) Part II.

(4) R. v. Egremont, 14 East, 253.

(5) R. v. Hampton, 5 T. R. 266. Buller J., dissent as to the second wife *after* the husband's death.

(6) R. v. Sowerby, 2 East, 276.

(7) For Emancipation, See Chap. VIII.

(8) R. v. Sherborne, Burr. s. c. 182. R. v. Darlington, 4 T. R. 797.

them. In this case, B. is not a certificated person, because *expressio unius est exclusio alterius.* (1)

In this case, C. D. E. are to be considered in the same situation as if they were named in distinct certificates. Therefore all that is said of A. in the first case supposed, applies to each of them. (2)

III. Suppose the certificate is granted to a single woman, and the child of which she is pregnant. Here, as a child *in ventre sa mere* is capable of being described, and the child is so described, the certificate extends to it though a bastard. (3)

If it is granted to her, and the child of which she is pregnant, and all other children she may hereafter have. In this case the certificate does not extend to younger children who are bastards; for bastards are not included in the general words of the act. (4)

Lastly, as to the modes by which a certificate may be discharged.

A certificate may be discharged in four ways. First, it may be discharged by a new settlement being gained by the certificated person in the parish to which he comes; (5) or, secondly, by a settlement being gained in a third parish. (6) Thirdly, it will be at an end if the certificated person is removed by an order of Justices. (7) Fourthly, it will also be *functus officio*, if the certificated person leaves the parish to which he comes, without any intention of returning. (8)

A certificate will be discharged, if the party gains a new settlement; if he is removed; or if he leaves the parish without any intention of returning.

The question then being, whether such a person is residing under a certificate, resolves itself into these inquiries:

First, is he named or described in any certificate? (9) Or, if not named or described, is he part of the *family* of a person named or described in the certificate, and not the head of a family himself? (10)

Second, has the certificate been properly executed and allowed?

Third, has it been delivered?

(1) *R. v. Storrington*, 7 T. R. 133.

(2) *R. v. Bath Easton*, 8 T. R. 446. And see what is said by Le Blanc, J. in *R. v. Thwaites*, 1 M. and S. 672.

(3) *R. v. Ipsley*, Burr. s. c. 650.

(4) *R. v. Maibon*, 7 T. R. 362. The word in the act is "*family*."

(5) See *R. v. Keel*, 2 Bott, 605, which decides that a settlement gained in the certifying parish, does not discharge the certificate; contrary to the former cases, *R. v. Great Torrington*, and *R. v. Keyusam*, Burr. s. c. 428, 429. But this decision, in *R. v. Keel*, is disapproved of by Lord Kenyon, in *R. v. Heath*, 5 T. R. 583, and yet he adhered to it in *R. v. Ingworth*, 8 T. R. 339, the two cases being exactly alike.

(6) See what is said by Lord Kenyon, in *R. v. Ingworth*, 8 T. R. 340.

(7) *R. v. Sudbury*, Burr. s. c. 373.

(8) *R. v. Newington*, 1 T. R. 354. See and consider *R. v. Keel*, 2 Bott, 605. *R. v. St. Michael's Coventry*, 5 T. R. 596. *R. v. Ingworth*, 8 T. R. 339, cases of temporary absence from the certificated parish.

(9) See *R. v. Thwaites*, 1 M. and S. 669. (10) *R. v. Mortlake*, 6 East, 397.

Fourth, does it continue in force? or is it *functus officio*?

If the answers to these inquiries concur in making the master or servant a certificated person during any part of the 40 days, then the servant cannot gain a settlement in the parish, which has received the certificate.

CHAP. III.

Of Settlement by Apprenticeship.

Foundation of
a settlement by
apprenticeship

By statute 3 W. and M., c. 11. s. 8., it is enacted that "if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement."

To this statute if we add that clause respecting a residence of forty days which was cited in a former chapter, (1) we have then before us the grounds upon which a settlement by apprenticeship principally rests, these statutes being limited and controlled, by subsequent acts, only in the less material parts.

The following proposition embraces all the principal points, which are to be regarded in investigating this head of settlement law.

Definition of a
settlement by
apprenticeship

Any person, who, by deed to be duly stamped, binds himself an apprentice for any time whatever to any other person, or who is bound an apprentice under certain restrictions, and when an infant, by parish officers or others thereto authorized by law, shall, by serving the master to whom he is so bound, or any other master to whom he is duly transferred, gain a settlement in that parish, in which he inhabits forty days during his service as an apprentice, provided the master whom he serves is not a toll-collector; (2) and provided that parish is not, during any part of the forty days, protected by a certificate.

This definition
consists of
three parts;
1. The Binding;

This main proposition may be divided into the following ones:

First, a person may by deed, to be duly stamped, either bind himself an apprentice to any other person for any term what-

ever, or be bound, under certain restrictions, and when an infant, by parish officers or others thereto authorized by law.

Second, any person, regularly bound apprentice, may gain a settlement by serving for forty days, either the master to whom he is bound, or a second master, to whom he is duly transferred by the first; or a third master, to whom he is duly transferred by the second, and so on; provided such service to a second, or other subsequent master, can be considered a continuation of the apprenticeship.

Third, the settlement of the apprentice is in that parish in which he has last completed a residence of forty days; provided such residence be referable to the apprenticeship; and provided neither himself, nor the master to whom he is bound, nor the master whom he is serving, have the character of a certificated person in that parish; and provided the master, under whom a settlement is claimed, was not a toll-collector.

I. A person may by deed, to be duly stamped, either bind himself apprentice to any other person for any term whatever, or be bound, under certain restrictions, and when an infant, by parish officers, or by others thereto authorized by law.

There are, it appears from this proposition, only two modes of constituting an apprenticeship; that is to say, by the party's binding himself, or by his being bound out on the part of a parish, &c. I shall consider, in the first place, those particulars in the binding, which are common to both modes; in the second place, those which relate only to one of them.

There are three rules which govern both a binding by the party himself, and a binding by others. They are these. I. That the binding must be by deed; II. that the deed must be duly stamped, such stamp varying according to the nature of the binding or the circumstances of each case; III. that the relation, constituted by the binding, should be the relation of master and apprentice.

I. The binding must be by deed. Formerly, it was necessary for it to be by deed indented. But the statute 31 Geo. 2. cap. 11., has dispensed with the indentures of the deed.

II. The deed of apprenticeship must be duly stamped.

From the 28th of June, 1694, to the 1st of May 1710, there existed only one kind of stamp, namely, the deed or indenture stamp.

From the 1st of May, 1710, to the 10th of October, 1804, besides the former stamp, distinct and additional stamps were imposed, in respect of the apprentice-fee or consideration contracted for, upon all bindings except those of children placed out by any parish, or by or out of any public

2. The service;

3. The residence of forty days in some one parish.

Of the binding.

There are two modes of binding;

1. By the party himself.

2. By other persons authorized by statute.

In both cases

the binding must be by deed.

And the deed must be duly stamped. Of the stamp in general.

charity. (1) Upon which bindings, only the indenture stamp continued to be required.

From the 10th day of October, 1804, till the 10th of October, 1808, a new scale of duties was in force, and two or more distinct stamps were no longer necessary. The statute, (2) which imposed these duties, repealed all former duties, and exempted the bindings of parish apprentices, and of children bound out by or out of any public charity. And this exemption has been continued by subsequent statutes, (3) to the present time.

From the 10th of October, 1808, to the 31st of August, 1815, a higher scale was in force, but upon the same plan.

And from the 31st of August, 1815, one still higher came into operation; and upon this latter scale it is, that the duties upon apprenticeships are to be paid at the present day.

Now in order to have a general, and at the same time a distinct view of the subject, let us see first what stamps have been at different times imposed upon parish bindings; secondly, what stamps have been imposed upon bindings at the expence of any public charity; thirdly, what have been imposed upon all other bindings.

1. Upon Parish Apprenticeships.

Of the stamp in parish ap- prenticeships.	From the 28th of June 1694, (4) to the present day; all subsequent statutes having exempted such bindings	£ s. d. 0 0 6
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2. Upon bindings at the expence of any public charity.

Of the stamp upon bindings at the expence of any public charity.	From the 28th of June, 1694, (5) to the 1st of August 1698	£ s. d. 0 0 6
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Of the stamp upon bindings at the expence of any public charity.	From the 1st of August 1698, (6) to the 1st of August 1797, the further duty of 6d., making to the 1st of August 1797 in all	0 1 0
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Of the stamp upon bindings at the expence of any public charity.	From the 1st of August 1797, (7) to the 10th of October 1804, if no greater sum was given with the apprentice than 10l., the same	0 1 0
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Of the stamp upon bindings at the expence of any public charity.	From the 1st of August 1797, to the 10th of October 1804, if a greater sum than 10l. was given with the apprentice, then an additional duty of 10s., making in all	0 11 0
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Of the stamp upon bindings at the expence of any public charity.	From the 10th of October 1804, (8) to the present day	0 0 6
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(1) See page 39.

(3) Stat. 48 Geo. 3, c. 149. Stat. 55 Geo. 3, c. 184.

(4) By Stat. 5 W. and M. c. 21. s. 3.

(6) Stat. 9 and 10 W. 3 c. 25. s. 30.

(8) Stat. 44 Geo. 3. c. 98.

(2) Stat. 44 Geo. 3. c. 98.

(3) Stat. 44 Geo. 3, c. 184.

(5) Stat. 5 W. and M. c. 21. s. 3.

(7) Stat. 37 Geo. 3. c. 111. s. 1.

3. Upon all other bindings.

And first of the deed stamp.

From the 28th of June, 1694, (1) to the 1st of August 1698	£	s.	d.	Of the stamp upon all other bindings. Of the deed stamp.
From the 1st of August 1698, (2) to the second of August 1714, the further duty of 6d. making in all to the 2nd of August 1714	0	0	6	
From the 2nd of August 1714, (3) to the 5th of July 1757, the further duty of 6d. making in all to the 5th of July 1757	0	1	0	
From the 5th of July 1757, (4) to the 5th of July 1776, the further duty of 1s., making in all to the 5th of July 1776	0	1	6	
From the 5th of July 1776, (5) to the 1st of August 1777, the further duty of 1s., making in all to the 1st of August 1777	0	2	6	
From the 1st of August 1777, (6) to the 1st of August 1783, the further duty of 1s. 6d., making in all to the 1st of August 1783	0	3	6	
From the 1st of August 1783, (7) to the 5th of July, 1795, the further duty of 1s., making in all to the 5th of July 1795	0	5	0	
From the 5th of July 1795, (8) to the 5th of July 1797, the further duty of 1s., making in all to the 5th of July 1797	0	6	0	
From the 5th of July 1797, (9) to the 1st of August 1797, the further duty of 3s., making in all to the 1st of August 1797	0	7	0	
From the 1st of August 1797, (10) to the 10th of October 1804, if no greater sum than 10l. was given or contracted for with the apprentice, the same	0	10	0	
From the 1st of August 1797, (11) to the 10th of October 1804, if a sum exceeding 10l. was given or contracted for with the apprentice; an additional 10s. making in all	1	0	0	
Next, of the stamp in respect of the apprentice-fee, or consideration contracted for.—				Of the stamp in respect of the premium.
By statute 8 Ann, c. 9. s. 32. (made perpetual by statute 9 Ann, c. 21. s. 7.) From the 1st of May 1710, to the 10th of October 1804.				Stat. 8 Ann, c. 9, s. 32.

(1) Stat. 5 W. and M. c. 21, s. 3.

(3) 12 Ann, St. 2. c. 9. s. 21.

(5) Stat. 16 Geo. 3. c. 34. s. 5.

(7) Stat. 23 Geo. 3. c. 58, s. 1.

(9) Stat. 37 Geo. 3. c. 90, s. 1.

(2) Stat. 9 and 10 W. 3. c. 25 s. 30.

(4) Stat. 30 Geo. 2. c. 19. s. 1.

(6) Stat. 17 Geo. 3. c. 50. s. 16.

(8) Stat. 35 Geo. 3. c. 30. s. 1.

(10) Ibid.

(11) Ibid.

If a sum not exceeding 50*l.* were given &c. with the apprentice; for every 20*s.* so given, a duty of 6*d.*

If a sum exceeding 50*l.* were given &c., with the apprentice; for every 20*s.* of such excess, a duty of 1*s.*

And in the latter case, it was necessary that there should be two distinct stamps; one denoting the 6*d.* duty, the other the 1*s.* duty. (1)

And no stamp was required for any sum given &c. with the apprentice, which was less than 20*s.* (2)

Under this statute, the indenture was directed to bear date upon the day of the signing, sealing, or other execution of the same. (3) And the following requisites were to be observed:

Premium to be inserted in the indenture, in words at length.

Within two months, the master to pay the duties.

If paid to the receiver general, the indenture then to be stamped. If to a collector, then, within fifty miles of the bills of mortality, to be stamped within three months; beyond fifty miles, within six months. The indenture void if the full sums were not inserted; or if the duties were not paid or the stamps affixed within the appointed times.

First, the full sum of money, or the full value of any thing not being money, (4) received, or in anywise directly or indirectly given, paid, agreed or contracted for, was to be inserted in words at length in the indenture. (5)

Second, within two months after the date of the indenture, the master or mistress, who by section 32, were the persons to pay the duty, were to bring or send the indenture either to the receiver-general at the head office, or to some collector of stamps, and pay the duties.

Third, if to the receiver-general, the indenture was then to be stamped. If to the collector, he was to indorse on the indenture a receipt for the monies paid, in words at full length, bearing date the day on which such payment was made, and was to subscribe his name thereto, and deliver it back to the person who brought it. (6) After which, for the purpose of stamping, the indenture was, if within 50 miles of the bills of mortality, to be brought to the head office within three months after the date of the deed; if at a greater distance, then within six months. (7)

Upon these enactments we are to observe that, although the statute says, that indentures which have not the full sums inserted, or upon which the duties have not been paid, or which are not stamped within the time there limited, shall be void, and not available in any court or place, or to any purpose whatsoever; (8) notwithstanding this, it has been said that the not inserting in words at length the full sum received or contracted for, does not make the indenture void. (9) But in other cases, it seems to be assumed that by such an omission it would be absolutely void. (10) And the

(1) 8 Ann, c. 9. s. 36.

(3) s. 35.

(6) s. 37.

(9) R. v. North Oworm, Burr. s. c. 145. (10) See R. v. Oadby, 1 B. and A. 477.

(4) s. 45.

(7) s. 38.

(2) Baxter v. Faulam, 1 Wils. 129.

(5) s. 35.

(8) s. 39.

words of the act seem to show that the same would be the effect, if the indenture were not stamped, (1) or if the duties were not paid within the appointed times. If the duties have not been paid at all, the indenture could not be given in evidence, by the general policy of all the stamp acts.

As to the paying duty upon the value of any other thing, not being lawful money of Great Britain, received or contracted for, this general rule is laid down ; that when instead of money such other equivalents, as a horse or other valuable thing of that sort, are given to the master by way of premium, there a duty ought to be paid for them. (2) But where meat, clothes &c., are to be provided by the friends of the apprentice, (3) or where a sum of money is paid beforehand to the master, for the purpose of clothing him ; (4) or where part of the apprentice's earnings are reserved to the master ; (5) in these cases no duty is payable, because there is not anything given to the master.

Duty to be paid upon the value of the premium when it is not in money. Sect. 45. meaning of this section.

It was at one time supposed, that where clothes or the like were to be provided by the friends of the apprentice, there should be an equivalent in what was allowed by the master, in order to exempt the indenture from the duty. (6) But this doubt has been since removed ; (7) and the rule is to be taken absolutely, as stated above.

Under this statute of Ann, then, we are to see, I. that the indenture is upon stamped paper ; II. that the premium is inserted in words at full length ; III. that the duties have been paid ; IV. that it has the proper stamp or stamps in proportion to the amount of premium ; V. that it has been stamped within the time limited ; VI. that the duties have been paid within the time limited.

Requisites under the stat. 8. Ann, cap. 9. in order to gain a settlement.

The exception, before mentioned, of parish apprentices and children bound out by a public charity, who are exempted from this duty in respect of the money paid with them, speaks of them as apprentices placed out at the public charge of any parish or township, or by or out of any public charity. (8) Which exemption, it has been determined, I. extends to all apprentices, the expence of whose binding is sustained by the parish, though they were not regularly bound out as parish apprentices ; (9) and II. is not confined to permanent public charities, but holds good where there is a

Exemption of apprentices placed out by a parish or by a public charity, from these duties. Meaning of this exemption.

(1) (*Cuerden v. Leyland*) *Curennden v. Laland*, 2 Stra. 903.

(2) *R. v. Leighton*, 4 T. R. 732, and see what is said by Aston, J. in *R. v. Portsea*, Burr. s. c. 898.

(4) *R. v. North Ofram*, Burr. s. c. 145.

(3) *R. v. Leighton*, 4 T. R. 732.

(5) *R. v. Wantage*, 1 East, 601.

(6) See *R. v. Portsea*, Burr. s. c. 834, and *R. v. Walton*, 3 T. R. 515.

(7) *R. v. Leighton*, 4 T. R. 732.

(8) s. 40.

(9) *R. v. St. Petrox in Dartmouth*, 4 T. R. 196.

fund provided by a voluntary annual subscription, (1) or where money is left by will for the purpose of such binding; as in one case where the bequest was in these words: "To Clifton 50*l.* to be given as my brother thinks fit; some of it to put out children apprentices." (2)

In these excepted apprenticeships, the premium need not be inserted. And why.

It has also been decided that, as the statute exempts the apprenticeships above mentioned from paying duties upon the premium or consideration money, it is not necessary to set out such premium in the indentures; the insertion of the premium being required for no other purpose but to ascertain the amount of the duty. (3)

Stamp duties under stat. 44 Geo. 3. c. 98.

On the 10th day of October 1804, the duties given by the statute of Anne ceased. All former duties upon indentures were repealed; and a new duty was imposed according to the following schedule: (4)

Upon every indenture of apprenticeship, where $\pounds$	<i>s.</i>	<i>d.</i>
the sum or value given, paid, contracted or agreed for, did not exceed 10 <i>l.</i> ; a duty of	0	15
Exceeding 10 <i>l.</i> and not exceeding 20 <i>l.</i>	1	10
Exceeding 20 <i>l.</i> and not exceeding 50 <i>l.</i>	2	10
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	5	0
Exceeding 100 <i>l.</i> and not exceeding 300 <i>l.</i>	12	0
Exceeding 300 <i>l.</i>	20	0

The same observations may be made respecting the duties payable upon the premium in this statute, as in the former one. (5)

If the apprentice agreed to allow his master two shillings a week, receiving himself wages from the master, so that this sum was in fact a deduction from the wages, such an allowance was not to be considered as a premium, (6) and therefore no duty was to be paid upon it.

Stamp duties under stat. 48 Geo. 3. c. 149.

These duties continued until the 10th day of October 1808, from which day a new scale of duties came into operation by statute 48 Geo. 3. c. 149. By this statute, schedule, part I., were imposed the following duties, viz.:

Upon apprenticeships where the premium did $\pounds$	<i>s.</i>	<i>d.</i>
not amount to 30 <i>l.</i>	0	15
Where it amounted to 30 <i>l.</i> and was under 50 <i>l.</i>	1	10
50 <i>l.</i>	2	10
100 <i>l.</i>	5	0
200 <i>l.</i>	10	0
300 <i>l.</i>	15	0

(1) *R. v. St. Mathews*, Bethnal Green, Burr. s. c. 574.

(2) *R. v. Clifton upon Dunsmore*, Burr. s. c. 699.

(3) *R. v. Oadby*, 1 B. and A. 477.

(5) See page 39.

(4) Stat. 44 Geo. 3. c. 98. sched. A.

(6) *R. v. Bradford*, 1 M. and S. 151.

	£	s.	d.
Where it amounted to 400 <i>l.</i> and was under 500 <i>l.</i>	20	0	0
500 <i>l.</i>	600 <i>l.</i>	25	0 0
600 <i>l.</i>	800 <i>l.</i>	30	0 0
800 <i>l.</i>	1000 <i>l.</i>	40	0 0
1000 <i>l.</i>		50	0 0

In the event of there being no premium to the master, then if the indenture did not contain more than 1080 words, there was a duty of 15 shillings.

And if it contained more than that quantity of words, there was a duty of 1*l.* 10*s.*

And where there were duplicates or two parts of such indenture, each part was charged with the duty imposed by this act, in all cases where the duty did not exceed thirty shillings. And where it exceeded that sum, only one part was charged with the *ad valorem* duty; and the other part was charged with a duty of 1*l.* 10*s.*

These latter duties were in force till the 31st of August 1815, when by statute 55 Geo. 3. c. 184. the following duties were imposed. And these are the duties which at the present day are to be paid upon indentures of apprenticeship.

Stamp duties
under stat. 55
Geo. 3. c. 184.

	£	s.	d.
If the premium does not amount to 30 <i>l.</i>	1	0	0
If it amounts to 30 <i>l.</i> but not to 50 <i>l.</i>	2	0	0
50 <i>l.</i>	100 <i>l.</i>	3	0 0
100 <i>l.</i>	200 <i>l.</i>	6	0 0
200 <i>l.</i>	300 <i>l.</i>	12	0 0
300 <i>l.</i>	400 <i>l.</i>	20	0 0
400 <i>l.</i>	500 <i>l.</i>	25	0 0
500 <i>l.</i>	600 <i>l.</i>	30	0 0
600 <i>l.</i>	800 <i>l.</i>	40	0 0
800 <i>l.</i>	1000 <i>l.</i>	50	0 0
1000 <i>l.</i>		60	0 0



Where there is no premium:

If the indenture does not contain more than 1080 words, a duty of 1 0 0

If it contains more than 1080 words, ... 1 15 0

III. The relation constituted by the binding should be the relation of master and apprentice.

If the binding be in other respects unobjectionable, it may still, perhaps, be a question whether the relation constituted by the deed be really that of master and apprentice. If that relation be not properly constituted, however, the contract may enure to give a settlement, as being a contract of hiring, it will not lay the foundation of a settlement by apprenticeship.

The relation
constituted
must be that
of master and
apprentice.

The question, as to the relation intended to be created, more frequently arises upon indentures which are in some respect defective, or upon contracts which are not by deed. And in either of these cases, if the intention of the parties were to create an apprenticeship, no settlement could be gained at all. For by the hypothesis it is not a good apprenticeship; and that which was intended to be a contract of apprenticeship, cannot be converted into a hiring as a servant.⁽¹⁾

The indenture must contain terms which create this relation.

But although the question most usually arises in this shape, it is still necessary, even when the indenture is free from all such objections, to see that it contains such apt terms as are required by law to create the relation of master and apprentice. We must therefore consider, in each case as it arises, the terms of the contract, and the legal import of those terms.

Instruction is the object of an apprenticeship. Service is the object of a hiring.

If a contract has for its object the instruction of the party who is to learn, it is a contract for a real or intended apprenticeship. (2)

If the principal object appear to be a service to be performed to the master, it is a contract of hiring as a servant, notwithstanding mention is made in the contract of the master teaching, and the servant learning any particular art or business (3)

Mode of determining the question.

Now, to descend to particulars; if the contract is in some respects equivocal, and a premium is given to the master, that is a circumstance which evinces an intention in the parties to constitute an apprenticeship. (4)

Moreover, if no premium be given, yet if the party serving is to receive no wages, that seems to be a circumstance tending to show that it is an apprenticeship rather than a hiring; since it is more usual for apprentices than for hired servants to work without wages.

And though the party is to receive wages, and though there is no premium given, there may, notwithstanding, be other circumstances in the case which show that the intention was to constitute an apprenticeship; as in the following example:

A. proposed to B.'s mother to take her son, then a boy, to learn his business. B. was to serve him four years, to board and lodge with his mother, and to have half of what he

(1) See hiring and service, p. 18.

(2) *R. v. Mountsorrell*, 2 M. and S. 460; *R. v. Bilborough*, 1 B. and A. 115.

(3) *R. v. Burbach*, 1 M. and S. 370.

(4) *R. v. Lainden*, 8 T. R. 379, and see *R. v. Mountsorrell*, 2 M. and S. 460. See also *R. v. Highnam*, 2 Bott, 371.

earned. Now, so far the circumstances were equivocal. But it also appeared, that the mother's poverty alone prevented the execution of indentures. This fact clearly shows, that it was the intention of the parties to contract the relation of master and apprentice. (1)

The case of *R. v. Little Bolton* (2) upon this subject has with some reason been called an anomalous one. (3) In this case, A. agreed to teach B. to weave counterpanes, if B. would work with him two years and a half, or three years. B.'s earnings were to be divided between them, and he was to find himself in meat, drink, washing, and clothes. The reason given by Lord Mansfield, in this case, for deciding that it was not an intended apprenticeship, is this: that all former cases of apprenticeship, which were holden to be defective, and not convertible into hirings, speak of the party as an apprentice, and that he was to serve as such.

It must not be supposed that Lord Mansfield here intended to say that no contract of apprenticeship could be formed, unless the word apprentice were introduced in it. He could only mean that it must be collected from the words of the contract, whether or not the party were to serve as an apprentice. (4)

The case of the *R. v. Little Bolton* has been reluctantly followed by the Court of King's Bench only when the circumstances were precisely the same. (5) It seems, therefore, that in all cases, which are in any degree distinguishable from the case of *R. v. Little Bolton*, we are at liberty to construe the intention of the parties, according to the real import of the terms which they employ; and that we are to consider only what is the main object and the substance of their agreement.

In the next place, as to those particulars which relate only to a binding by the party himself, there are three observations to be made:

Rules in the case of a party binding himself.

I. That the apprentice may bind himself to any person whatever; and may himself be of any age above the age of nurture.

II. That the binding need not at any time have been for seven years, the period mentioned in the statute 5 Eliz. c. 4.

III. That the apprentice, in order to bind himself, must execute the deed of apprenticeship; and that by so doing he completes the binding, to which therefore the execution by the master or by any other person is not in any way necessary.

(1) *R. v. St. Margaret's King's Lynn*, 6 B. and C. 97.

(2) 2 Bott, 222.

(3) By Lord Kenyon, in *R. v. Laindon*, 8 T. R. 383.

(4) By Lawrence, J. in *R. v. Laindon*, 8 T. R. 385.

(5) *R. v. Eccleston*, 2 East, 298.

He may bind himself to any person whatever.

I. The apprentice may bind himself to any person whatever. Whether the master be a person who, by the statute of Elizabeth, has a right to take an apprentice, or whatever his age or condition may be, is quite immaterial. The master may be residing under a certificate, and this circumstance does not render the binding ineffectual for the purpose of a settlement, though, as will hereafter be shown, no settlement can be gained in the place where the certificate is in force.

And his own age, provided he be not under seven, is immaterial. The binding need not at any time have been a binding for seven years.

The age of the person binding himself is also immaterial, so as he be not under the age of seven years. (1) An infant may bind himself, since it is for his benefit. (2)

II. The binding need not at any time have been a binding for seven years, the period mentioned in the statute 5 Eliz. c. 4.

This regulation in the statute of Elizabeth is now repealed, by statute 54 Geo. 3. c. 96. s. 2. But even before that repeal, it was held to be a regulation which did not render a binding for a less term absolutely void, but only made it voidable at the election of the parties. (3) And the statute of Elizabeth did not apply at all to the binding of adults. (4)

An apprentice binding himself, must execute the indenture, whether an infant

III. The apprentice, in order to bind himself, must execute the deed of apprenticeship.

With respect to an infant, we have before seen that he may bind himself. In order to do this he must himself execute the deed.

A father has no power to bind his son apprentice without his assent. (5) And that assent must be testified by the execution of the indenture; (6) nor is his adoption of the contract, by serving under the indenture, tantamount to execution; for an infant cannot be bound by matter in pais. (7)

Or an adult.

In the case of an adult also, the only valid mode of binding is by executing the indenture. And it has been adjudged, in this case too, as well as in that of an infant, that serving under the indenture cannot supply the want of execution (8) For the statute 3 W. and M. c. 11, which gives the settlement by apprenticeship, requires that the person who is to gain it should "be bound an apprentice by indenture." Now a party cannot be said to be bound by indenture, who is not

(1) Chap. I. page 2.

(2) *Newbury v. St. Mary's Reading*, 2 Bott, 363.

(3) *R. v. St. Nicholas in Ipswich*, Burr. s. c. 91; *R. v. Evered*, cited by Lord Ellenborough in *Gray v. Cookson*, 16 East, 27. See *Whelpdale's case*, 5 Co. 119, for the general rule as to what is void, and what is only voidable.

(4) *Smedley v. Gooden*, 3 M. and S. 189.

(5) *R. v. Arnesby*, 3 B. and A. 584.

(6) Per Best, J. in *R. v. Arnesby*, 3 B. and A.

(7) *R. v. Arnesby*, 3 B. and A. 584.

(8) *R. v. Ripon*, 9 East, 295.

liable under it for covenant broken. If he does not execute the indenture, but only acts upon it without execution, he is not liable under it for covenant broken, but is only liable under the implied contract raised by the benefits which he takes under it. (1)

By the execution on the part of the apprentice, the binding is complete. Neither the master to whom he is bound, (2) nor the father or other person who may take part in the matter, need add their execution to the indenture.

Lastly, as to those particulars which relate exclusively to the binding of parish and other apprentices bound by public authorities. And first of parish apprentices.

Before the 1st. of October 1816, the binding of parish apprentices was principally regulated by the statute 43 Eliz. c. 2. s. 5. From that day, the binding is under the statute 56 Geo. 3. c. 139.

Of parish apprentices

I shall consider these statutes separately, taking care to state only such enactments as are necessary to be observed, in order to make the deed valid and effectual, for the purpose of gaining a settlement. And I shall omit all such particulars in these, as well as in other statutes, which consist only of directions or instructions to magistrates or parish officers.

First, then, by the statute 43 Eliz. c. 2. s. 5. "the churchwardens and overseers, or the greater part of them, by the assent of two justices, one of whom must be of the quorum, may bind any such children, whose parents they shall judge not able to maintain them, to be apprentices where they shall see convenient, till such man-child shall come to the age of 24 years," (altered by statute 18 Geo. 3. c. 47. to 21 years) "and such woman-child to the age of 21, or marriage; the same to be as effectual to all purposes as if such child were of full age, and by indenture of covenant, bound him or herself."

bound under stat. 43 Eliz. c. 2.

Under this statute, besides the proper stamp, which has been before mentioned, (3) it is necessary; I. that the greater part of the churchwardens and overseers should execute the indenture; II. that two justices should allow it; III. that one of these justices should be of the quorum.

Requisites under this statute.

I. The greater part of the churchwardens and overseers must execute the indenture.

Indenture to be executed by the greater part of the churchwardens and overseers.

Now, the greater part of the churchwardens and overseers

(1) This is the argument of Holroyd, J. in *R. v. Arnesby*, 3 B. and A.
 (2) *R. v. St. Peter's on the Hill*, 2 Bott, 367. (3) Page 36.

means the greater part of the aggregate body of churchwardens and overseers, (1) and not the majority of each of those classes. Whether the majority, required to make a good binding, should be a majority of those originally appointed, or of those who were churchwardens and overseers at the time of the binding, seems to be a matter of some doubt. (2)

Suppose an indenture is executed by one person only as churchwarden, and by one person only as overseer; this, by intendment of law, may be taken to be the greater part of the churchwardens and overseers; for, since by custom there may be one churchwarden, (3) it may be intended that there is such a custom in this case; and it may be further intended that, originally, two overseers were elected according to the statute, (4) but that one of them died before the binding took place; and it may be still further intended, that the deed was executed before another overseer was appointed in his place. (5)

The statute 43 Eliz. c. 2. requires that there should be overseers distinct from the churchwardens. (6) Now, in some parishes, it is the practice to appoint only two persons, who are to act in the capacity of churchwardens as well as of overseers; and in others there are three officers, one of whom is both churchwarden and overseer. In these cases, the execution of the indenture was not valid, until the statute 51 Geo. 3. c. 80. came in aid of the defect. That act, and the construction which has been put upon it, (7) give effect to all deeds of apprenticeship which have been executed by parish officers acting in the double capacity of churchwardens and overseers. Which statute applies not only to all indentures executed since the passing of the act, but to all previous indentures also, provided no judicial decision had before that time taken place upon them. (8)

By stat. 51. G.
3. c. 80. Deeds
executed by
parish officers,
who act both
as churchwar-
dens and over-
seers are ren-
dered valid.

Indentures ex-
ecuted by per-
sons who style
themselves
churchwar-

There are some townships, hamlets, and chapelries, which maintain their poor within their own limits, and separately from the parish of which they form a part; and it has sometimes happened that indentures of apprenticeship have been executed by persons who style themselves churchwardens of

(1) Assumed in *R. v. Whitchurch*, 1 Manning and R. 472. See *R. v. Hinckley*, 12 East, 361.

(2) See *R. v. Catesby*, 2 B. and C. 817.

(3) *R. v. Hinckley*, 12 East, 361.

(4) Stat. 43 Eliz. c. 2.

(5) *R. v. Catesby*, 2 B. and C. 814.

(6) *R. v. Ali Saints*, Derby, 13 East, 143.

(7) *R. v. St. Margaret's*, Leicester, 2 B. and A. 200.

(8) Stat. 51 Geo. 3. c. 80. s. 2.

the township or hamlet, or chapel-wardens of the chapelry, which persons have not been sworn into that office, but only into the office of churchwarden of the whole parish. Indentures, executed by persons in this predicament, are rendered valid by the statute 54 Geo. 3. c. 107., whether those indentures were executed before, or whether they have been executed since the passing of that act. The act, however, requires that the churchwardens, thus executing indentures by a wrong title, should really have been sworn into one or other of the offices; that is, either into the office of churchwarden for the whole parish, or into the office of churchwarden or chapelwarden of the smaller district.

dens, &c., of a township, &c., but who are, in fact, churchwardens of the whole parish, rendered valid by stat. 54 Geo. 3. c. 107.

The same statute, in section 2, gives to the actual overseers and churchwardens or chapel-wardens, acting or appointed for the smaller district, the same power of binding apprentices, which was bestowed by the statute of Elizabeth upon the officers of the whole parish, and declares all indentures, already executed in that manner, to be valid and effectual.

Indentures, executed by the officers of the smaller district, are by stat. 54 Geo. 3. c. 107. declared valid.

In this statute too, it is directed that no settlement, upon which any order had been before that time duly made, should be affected by any thing which the act contained.

The churchwardens and overseers of a parish, which has united with others under stat. 22 Geo. 3. c. 83., and for which a guardian has been appointed, are still competent to bind parish apprentices as before. For though the seventh section of that act prohibits the churchwardens and overseers from interfering in the care and management of the poor; yet the thirtieth section enacts, that when poor children are of sufficient age to be bound apprentices, they shall be placed out at the expence of the parish, "according to the laws in being," and one of these laws is the 43 Eliz. c. 2. (1)

The binding may be by the churchwardens and overseers, notwithstanding there is a guardian of the poor under stat. 22 Geo. 3. c. 83.

In this case it is not necessary that the guardian should sign the indentures. (2)

And the guardian need not sign. The binding to be allowed by two justices.

II. Two justices of the peace are to allow the binding of the apprentice, which allowance of the binding, or assent to it, must be testified by their signatures, (3) and being a judicial act, should take place when they are together. (4) If they are not together when they sign the indenture, they must, at least, meet and consult together upon the propriety of allowing the apprenticeship. If one magistrate signs the inden-

(1) R. v. Lutterworth, 3 B. and C. 487.

(2) Ibid.

(3) R. v. Saltern, 1 Bott, 619. By Buller, J.

(4) R. v. Hamstall Ridware, 3 T. R. 380.

Who ought to meet together for the purpose, this being a judicial act.

One of the justices to be of the quorum.

The other directions of the stat. 43 Eliz. need not be strictly followed.

Defects therein make the indenture voidable only.

Of binding parish apprentices under the stat. 56 Geo. 3. c. 139.

Every binding, in which the parish funds bear part of the cost, is to be allowed by two justices.

The word overseer in

ture when alone, and is afterwards present when the other executes it, and they concur in thinking the binding a proper one, this is sufficient. (1) If they never meet together to deliberate upon the subject, the allowance, and consequently the binding, are clearly bad. (2)

III. One of these justices must actually be of the quorum. It is no longer necessary to state, upon any occasion, that this is so; (3) but if the fact is otherwise, and is proved to be otherwise, it is a defect which vitiates the indenture.

With regard to all other directions given by the statute 43 Eliz. for binding parish apprentices, it is not necessary that they should be closely followed; any defect therein not tending directly to invalidate the indenture, but only to render it voidable at the election of the parties. It has been decided that the binding of a woman-child to the age of twenty-one, without adding the alternative of marriage, (4) and the binding of a boy till twenty-three, instead of twenty-four, (5) were not bindings absolutely void, but only voidable; and the same of an unlimited binding of a parish apprentice. (6)

In the second place, of binding parish apprentices under statute 56 Geo. 3. c. 139.; that is, of all bindings after the 1st of October, 1816.

By this statute, section 11, it is enacted, that any binding, by reason of which an expence is incurred by the public funds of the parish, is to be approved of by two justices, under their hands and seals, (7) according to the provisions of the statute, 43 Eliz. c. 2. and of the statute of Geo. 3.; so that, if an indenture is in every other respect a regular one, if it is executed by the apprentice, has the proper stamp, &c., it may be still a matter of inquiry whether any part of the premium has been paid, or any of the expences attending the indenture have been defrayed by the parish. If the parish fund has been at any charge by means of the indenture, the indenture is not good, and no settlement can be gained under it. (8)

In this statute, it is to be observed that overseers only are spoken of. By section 18, this word overseer is made to comprise all churchwardens having the power of overseers;

(1) *R. v. Winwick*, 8 T. R. 455.

(2) See *R. v. Hamstall Ridware*, 3 T. R. 380; and *R. v. Winwick*, 8 T. R. 445.

(3) Stat. 26 Geo. 2. c. 27.

(4) *R. v. St. Petrox*, Burr. s. c. 248.

(5) *R. v. Chalbury*, 1 Bott, 610.

(6) *R. v. Woolstanton*, 1 Bott, 610.

(7) *R. v. Stoke Damarel*, 1 Man. and R. 458.

(8) S. 11.; and see s. 5.

and all that is enacted in the statute respecting any parish or place, is extended to every incorporated or other district for the maintenance of the poor; and the officers of any such district, having power to bind apprentices, are made subject to all the rules in this act laid down, respecting overseers of the poor. This enactment does not appear to bestow on the officers of incorporated districts any powers for the binding of parish apprentices, beyond what they possessed before the passing of the act. (1)

As to the particulars required by the statute in the binding of parish apprentices since the 1st of October, 1816, they are as follows:—

I. It is not lawful for any parish officers to bind out any child as parish apprentice who has not attained the age of nine years. (2)

II. Two justices of the county or place in which the child's parish is situated, are to make an order, declaring that the intended master is a fit person to whom the child may properly be bound, and that the overseers are at liberty to bind the child accordingly. (3)

If the parish to which the child belongs is not more than forty miles from the city of London, the child cannot be bound to any person out of the county, who lives at a greater distance from the place than forty miles. (4)

If the child's parish is more than forty miles from London, then the two justices may make a special order for binding the child apprentice at a greater distance than forty miles. This order must distinctly specify the grounds upon which they think fit to allow of a binding at that distance. (5) In the computation of this distance, we are only to attend to what may be termed *territorial* counties; and cities, &c., which are counties in themselves, are to be reckoned as part of the territorial county in which they are situated; and the same of districts which belong to different counties from those within which they are inclosed; thus, for instance, the town and county of Southampton is to be reckoned as part of Hampshire; and the district A., which belongs to county A., is to be considered as part of B., the county by which it is surrounded. (6)

III. According to Holroyd J., notice of the intended binding should be given to the overseers of the master's parish, although it be in the same county; (7) but this construc-

this act is made to comprise all churchwardens.

The act is extended to districts; but it does not give any *new* powers of binding to the officers of districts.

Child to be nine years old.

Two justices to make an order for the binding of the child.

Distance within which the master should be living.

In what case a special order of justices must be made.

Distance how to be computed.

Notice, according to Holroyd J., to be given to the over-

(1) See p. 47. *R. v. Lutterworth.*

(2) Sect. 7.

(3) Sect. 1.

(4) *Ibid.*

(5) Sect. 1, and see sect. 5.

(6) Sect. 4.

(7) *R. v. Newark upon Trent*, 3 B. and C. 70; Abbott C. J. thinks otherwise, *Ibid.* 87. See sect. 2.

seers of the master's parish in all cases.

Objection to this construction.

The two justices to allow before execution of the indenture by others.

If the master lives within a borough, &c., the justices of the county may allow the indenture, unless the child's parish be also in the borough.

If the binding is to a place in another county, it must be allowed also by two justices of that county.

Neither of these justices to be of the same business as the master.

Before allowance by these last justices, notice must be given to the overseers of the master's parish.

tion of the act is open to the objection urged by Abbott C. J., in *R. v. Newark-upon-Trent*, (1) namely, that the notice is made to be given after the order, which is the important act; and that when the overseers have appeared before the justices, there is nothing left to be done by them but the allowance, which is only a ministerial act; whereas, it would have been more fitting that the notice should be given in the first instance.

IV. The two justices are to sign their allowance of the indenture, before it is executed by any of the other parties thereto. (2)

V. If the child is bound to a master who lives within some borough or liberty, the justices of the county in which the borough or liberty is situated, may allow the indenture, notwithstanding the justices of the borough or liberty have, in other respects, exclusive jurisdiction: (3) and this rule applies both to a binding in the same, and to a binding in another county, (4) the justices, who are, as we shall presently see, to allow the indenture in the latter case, having, for this purpose, the same jurisdiction within boroughs and liberties, as that bestowed upon the justices, of whom I have been hitherto speaking.

But if the binding parish be in a borough, the justices of which have exclusive jurisdiction, then the original order for the binding, and the first allowance of the indenture, must be by the justices of the borough. (5)

VI. If the child is bound to any place out of the county or district, or to any place where the justices have not jurisdiction, then it must be allowed also by two justices of such other county or district. (6)

VII. Neither of the justices of the county into which the apprentice is bound should be engaged in the same business, employment, or manufacture in which the master is engaged. If he is so, he is not competent to allow the indenture. (7)

VIII. No justice of the second county or district is to allow the indenture, unless the overseers of the place where the child is to be bound have received notice of the intended binding. (8) And the notice must be proved (or admitted, in the presence of the justice, by one of the overseers,) before the justice shall sign the indenture. (9)

(1) 3 B. and C. 86-7.

(2) Sect. 1.

(3) Sect. 3; and *R. v. Newark-upon-Trent*, 3 B. and C. 59.

(4) See *R. v. Newark*, 3 B. and C. 73. (5) See *R. v. Newark*, 3 B. and C. 85. (6) Sect. 2.

(7) Sect. 2, and quære, does this apply when the child is bound in its own county? Thought not to do so by Abbott C. J., in *R. v. Newark-upon-Trent*, 3 B. and C. 84, and by Holroyd J., *ibid* 71.

(8) *R. v. Newark-upon-Trent*, 3 B. and C. 59, by three justices, Abbott C. J. dissenting.

(9) Sect. 2.

ix. In all indentures under this statute, the order of the justices for binding the child must be referred to by the date thereof and the names of the justices. (1)

x. The indenture must be executed by the greater part of the churchwardens and overseers.

The statute of Elizabeth is not repealed by this statute of George 3; nor are any other persons introduced, nor is any new mode pointed out, for executing such indentures. The statute of Elizabeth must therefore be looked to, in order to ascertain the mode of execution. Upon which subject, some observations have already been made. (2)

If there is a defect in any one of these ten requisites, the indenture is absolutely void.

For, with respect to the first requisite,—I mean the age of the child,—the statute saying that it is not lawful to bind a child under the age of nine years, it is quite clear that no legal or valid binding can be effected where the subject of it is so expressly placed out of the authority given to parish officers and magistrates.

With respect to the remaining points, except the last, they all depend upon the fifth section of the statute, which enacts that no settlement shall be gained, unless such order shall be made, and such allowances of such indenture shall be signed, as thereinbefore directed. Therefore, if the order, or the allowance, or the indenture itself, be not respectively that which the statute directs, the defect is fatal to the settlement. (3)

And with regard to the last requisite, namely, the execution by the greater part of the churchwardens and overseers, that stands as it did before the passing of the statute of George 3. Being essentially necessary then, it is essentially necessary now. (4)

There are two cases in which the regulations for binding out poor apprentices are somewhat different from those above mentioned. These are:—i. The case of apprentices to the sea-service. ii. The case of apprentices bound to chimney-sweepers.

i. Of apprentices to the sea-service. Any boy of the age of ten years or upwards, who is chargeable to the parish, or whose parents are chargeable, or who begs for alms, may be bound to any subject, who is master or owner of any vessel that is used in sea-service, and which belongs to some port of England or Wales, or to Berwick-upon-Tweed; and such boy may be bound until he attain the age of twenty-one. (5)

Order of justices for the binding to be referred to in the indenture. Indenture to be executed as under stat. 43 Eliz.

Any defect in these requisites will make the indenture void.

Of apprentices to the sea-service. Who may be bound.

(1) Sect. 1, R. v. Bawbergh, 2 B. and C. 222.

(2) Page 45.

(3) See R. v. Bawbergh, 2 B. and C. 225. (4) Page 45. (5) Stat. 2 and 3 Ann c. 6. s. 1.

And by what authority.

The persons who are empowered to put him out are, first, two justices of the peace; secondly, the mayors, aldermen, bailiffs, and other chief officers and magistrates, in corporations; thirdly, the churchwardens and overseers of parishes, or the overseers of townships, (1) with the consent of such justices or chief officers. (2)

The boy's age is to be inserted in the indenture. (2)

Of apprentices to chimney-sweepers. By what authority, at what age, under what circumstances, and in what manner, they are to be bound.

II. Of apprentices to chimney-sweepers. From the fifth of July, 1788, the churchwardens and overseers of any parish or place, or the overseers of any township or village, with the consent of two justices under their hands, according to a form given by the statute, (3) may bind or put out any boy of the age of eight years, who is chargeable, or whose parents are chargeable, or who begs for alms, or with the consent of the parent of such boy, to be an apprentice to any chimney-sweeper, until such boy attains the age of sixteen; and the age is to be inserted in the indenture. (4)

All indentures for employing such apprentice under the age of eight years, are declared absolutely void. (5)

The form given by this statute makes the binding to be either by the parish officers or the parent of the boy. But as the enacting part of the statute is positive, that the parish officers are to be the binding party, they must in all cases execute. When such binding is by the consent of the parent, it may be a question whether, in that case, the parent should be a party to the deed, or in what manner his consent should be given.

Of the service.

XI. Any person regularly bound apprentice may gain a settlement by serving, for forty days, either the master to whom he is bound, or any other master to whom he is duly transferred; provided such service to every master, subsequent to the first, can be deemed a continuation of the apprenticeship.

A service of forty days may gain a settlement.

With respect to the service in general, to whatever master it may be performed, it is to be observed, that the shortest time in which the apprentice can gain a settlement, is a space of forty days. At the end of that time, he may be settled: whether he is so, in point of fact, depends, as we shall hereafter see, upon the place and circumstances of his residence. (6)

Serving a second master, &c., is good,

Next, as to serving a second or other subsequent master. Such service is good, whenever it appears to be a constructive

(1) Sect. 3.

(2) Sect. 1.

(3) Form A, stat. 28 Geo. 3. c. 48.

(4) Stat. 28 Geo. 3. c. 48. sects. 1, 2, 3. 5.

(5) Sect. 4.

(6) See page 60.

service of the first master under the indentures. And if we keep this in mind, all the rules and restrictions laid down for the assigning or making over of an apprentice will appear to be established on a sufficiently reasonable foundation.

If it is a constructive service of the first master.

For, in the first place, the person bound was bound as an apprentice to the original master. It is therefore as an apprentice that he must serve the master to whom he is assigned. (1)

The service to the second master must be as apprentice.

In the next place, that cannot in reason be called a constructive or virtual service of the first master, which is entered into without that master's consent. If I have an apprentice, for whom I have not at the time any employment myself, and give him leave to go and work for himself, and with whomever he pleases, (2) I cannot in this case be said to retain his services. But if I give him permission to serve a particular person, (3) or recommend him to any one for that purpose, such permission or recommendation shows an intention on my part to act upon the indentures, to prosecute my part of the contract, namely, the teaching him, and to continue the relation which subsisted between us. A general indiscriminate licence evinces no such intention. My apprentice, under such a licence, may work for whom he pleases. Nor does it at all alter the case that I may know into whose service he is going. (4) I must either keep him actually or constructively in my service: actually, by not allowing him to serve another; constructively, by appointing another master in my place. I cannot do the latter, unless I give my particular consent to the particular service into which he goes. And this is therefore the second requisite, in order to render such a service a good and valid service under the indentures.

It must be with the particular consent of the first master.

In the third place, that cannot be called a constructive service under the indentures, which is a service performed to a master who is of a totally different trade from that which I his original master carry on, which by the indentures I engage to teach him, and which it was the object of the binding that he should learn. The service with the second master must be compared with that contemplated by the indentures. Wherever the comparison fails, the apprenticeship fails to be continued.

It must be with a master who is of that trade, &c., which the first master has engaged to teach.

Fourthly, I cannot be said to retain the apprentice in my service, when I believe that the indentures are at an end, and

There cannot be this constructive ser-

(1) *R. v. Whitchurch*, 1 B. and C. 574.

(2) *R. v. St. Luke's*, Burr. s. c. 542; *R. v. Crediton*, 1 East, 59.

(3) *R. v. Holy Trinity in the Minorities*, 3 T. R. 605.

(4) *R. v. Ideford*, Burr. s. c. 821.

vice under the indentures, if the first master believes that the indentures are at an end.

when, acting under that impression, I give my consent to his serving another ; for I am not, in this case, pursuing the object of the binding, nor contemplating the performance of the contract. I am here not giving my consent to the apprentice serving another under the indentures, but am providing for him as if he were free from the obligations which they imposed. From all which it is clear that the first master must recognise the existence of the indentures, at least must do nothing which shows a belief in his mind that the indentures are at an end. (1)

Or if the second master does not know whose apprentice he is, or that he is an apprentice at all.

Fifthly, that cannot be said to be a constructive service to me, which the master, to whom he goes, looks upon as an original service performed to himself. I am, by the transfer which I make, supposed to employ the second master to perform that duty which, by the indentures, I have taken upon myself. I cannot be said to employ him for that purpose, if he does not know that the person whom he takes into his service is my apprentice ; (2) still less, if he does not know that he is an apprentice at all. (3) Therefore it is also necessary that the second master should know the circumstances relating to the apprentice.

Or if the indentures are, in fact or in law, at an end.

In the last place, since the apprentice came to serve me under the indentures, it is necessary to consider, in all cases, whether at the time of the transfer the indentures are really subsisting, or whether in fact or in law they are cancelled and annulled. If they are not in force, the apprenticeship, it is clear, cannot be carried on ; and if, under these circumstances, I transfer my apprentice to another, who takes him as an apprentice, by such a proceeding no settlement can be gained : for the apprentice transferred cannot, in this case, be considered as a hired servant, the nature of the two engagements and of the two services being totally different the one from the other. (4)

Of the means by which an indenture may be annulled.

Now, in order to see whether the deed of apprenticeship is subsisting or not, we must consider by what acts and in what manner it may be vacated. And the mode of vacating a deed of apprenticeship must vary, according to the nature of the deed. The deed may either have been, in the first instance, absolutely good and valid, or it may have been made under such circumstances as to be voidable at the election of the parties. I shall first speak of the mode of vacating valid deeds of apprenticeship ; secondly, of vacating such as are voidable.

(1) *R. v. Christowe*, 11 East, 95.

(3) *R. v. Whitchurch*, 1 B. and C. 576.

(2) *R. v. Ashby-de-la-Zouch*, 1 B. and A. 116.

(4) See page 18.

1. When the apprentice is of age, he may discharge himself from the indentures, with the consent of the master: and this even a parish apprentice might have done at the time when parish apprentices were bound to the age of twenty-four; (1) the consent of parish officers not being, when the apprentice came of age, in any way necessary to the dissolution of the contract. (2)

When the apprentice is under age, he cannot discharge himself from the indentures *in any way*, unless the dissolution of the contract be for his benefit. If, from the circumstances of the case, it appear to be manifestly for his benefit, then an end may be put to the engagement: as, for instance, where the master having absconded, the infant can no longer derive instruction or support from him. (3) But if there is no circumstance from which it can be inferred that it is for his benefit to put an end to the apprenticeship, the case then falls within the general rule; and the general rule is, that since it is for the benefit of an infant to bind himself apprentice, it is competent for him to make such a contract; but that the binding, being for his benefit, it is impossible to say, *generally*, that it is for his benefit to dissolve that connexion. Such a position involves a contradiction. (4)

Now, as to the manner in which a valid deed of apprenticeship may be annulled. First, it may be by cancelling; secondly, by the master delivering it up to the apprentice, (5) or to some one on his behalf; (6) or by the performance, on the part of the apprentice, of the consideration for which the delivery was agreed to be made, although, in fact, the delivery has not taken place; (7) thirdly, by discharge under the hands and seals of four justices, one of them being of the Quorum, or of the mayor and three other officers of a corporation, according to the statute 5 Eliz. c. 4. s. 35; or, where there are differences between the master and apprentice, or where the apprentice complains of ill usage, then by discharge under the hands and seals of two justices, in the case of parish apprentices before the 1st of October, 1816, or of any other apprentice upon whose binding no larger sum than 5*l.* (altered now, by stat. 4 Geo. 4. c. 29. to 25*l.*) was paid, under the provisions of the stat. 20 Geo. 2. c. 19. s. 3; or by discharge, ordered by two justices, in the case of any parish apprentice, on whose binding not more than 5*l.* was

A valid indenture may be annulled when the apprentice is of age, by agreement with his master.

When under age, he cannot discharge himself in any way, unless it be for his benefit.

Mode of annulling a valid indenture: by cancelling; by delivering it up, or by what is tantamount to delivery; by particular statutes in particular cases;

(1) Before the stat. 18 Geo. 3. c. 47.

(2) *R. v. Ecclesal Bierlow*, Burr. s. c. 562.

(3) *R. v. Mountsorrell*, 3 M. and S. 497. See *R. v. Weddington*, Burr. s. c. 770.

(4) *R. v. Wigston*, 3 B. and C. 484.

(5) *R. v. Mountsorrell*, 3 M. and S. 497.

(6) *R. v. St. Mary Kalendar*, Burr. s. c. 274.

(7) *R. v. Harberton*, 1 T. R. 139.

given, when the master becomes insolvent, or unable to maintain his apprentice ; (1) or in the case of parish apprentices since the 1st of October, 1816, by consent of two justices, where the parties concerned wish to put an end to the apprenticeship. (2) But, in this last case, it seems that the apprentice, who is of course a minor, cannot be thus discharged from his apprenticeship, unless it be for his benefit. And in all cases, where the discharge is voluntary, and not the sentence of magistrates upon a complaint brought before them, we must bear in mind the difference already pointed out between an apprentice who is a minor and an apprentice who is of full age. Fourthly, apprenticeship being a personal trust between the master and apprentice, (3) a valid deed of apprenticeship may be annulled by the death of the master, (4) if the apprentice choose to take advantage of that circumstance ; otherwise, it may continue. (5) In the case of parish apprentices, for the binding of whom no greater premium than 5*l.* was given, the personal representatives of the master are, by statute 32 Geo. 3. c. 57., discharged from maintaining such apprentices for more than three months after the death of the master, and the apprentice during that time is to serve the representatives of his master, and to be subject to the laws for the regulation of masters and apprentices.

by the death of the master, if the apprentice chooses to take advantage of it.

A voidable indenture may be avoided in the same way as a valid one, and also by the election of either the master or the apprentice.

II. A voidable deed of apprenticeship, besides being dissoluble in the same way that a valid deed of apprenticeship may be dissolved, namely, by cancelling, by delivering up, or, what is tantamount to a delivering up, by discharge under judicial sentence, or by the death of the master : in all which cases, the voidable indenture would stand exactly in the situation of a valid one. Besides being dissoluble in this way, it may also be avoided by some act of one of the parties, by which act he declares his election to have the deed considered as void.

This election may be made by a minor.

Now it is to be observed, in the first place, that a minor is quite as competent to make this election as one of full age.

It must be made by some unequivocal act, declaratory of an intention to

In the next place, as to the mode of making this election, it may be signified by any act which unequivocally declares the intention of the party to take advantage of the defect in the binding.

Now, indentures of apprenticeship cannot be avoided by merely doing that, which is forbidden by and in violation of

(1) Stat. 32 Geo. 3. c. 57. s. 8.

(2) Stat. 56 Geo. 3. c. 139. s. 9.

(3) Per Eyre J. in *R. v. Peck*, 1 Salk. 66.

(4) *R. v. Eakring*, Burr. s. c. 320.

(5) *R. v. East Bridgeford*, Burr. s. c. 133 ; *R. v. Barnsley*, 1 M. and S. 377.

them as long as they continue in force. (1) Thus, for instance, if an apprentice, whose binding is voidable, runs away from his master, he cannot, by such an act as this, avoid his indentures. (2) But if, while serving regularly, he declares his intention to depart, and to vacate the indenture, his determination is then plainly and unambiguously expressed. (3)

avoid the indenture.

And the master may, on his part, at any time during the term of the apprenticeship, declare, in a similar manner, his election to have the indenture considered as void.

But if no such intention is manifested on either side; as, for instance, where a master-mariner merely consents to his apprentice engaging in the king's service; (4) the apprenticeship in every such case remains undissolved.

When a voidable indenture is once regularly and legally avoided, the binding, as it seems, becomes *ab initio* a bad binding, and no settlement therefore can be gained under it.

When once avoided, the binding is bad *ab initio*, and no settlement can be gained under it.

This digression, respecting the dissolution of an apprenticeship, will show in what cases an apprenticeship is still subsisting; and we may now consider, rather more at large, the transfer or assignment of an apprentice. The necessary ingredients in a good transfer have been already considered; they are these: that he must enter into the service of the second master as an apprentice; that the first master must give his particular consent to the particular service; that the trade or business of the second master must be that for the learning of which the apprentice was bound; that the apprenticeship should not be considered, by the first master, at an end at the time of the transfer; that the second master should know and recognise the apprenticeship; and that the deed, by which the apprenticeship is constituted, should be really in law subsisting at the time.

If these several requisites concur in any one case, they tend to show that the apprenticeship is continued. It is this continuation of the apprenticeship which is so much insisted on in modern cases, and without which no settlement can be gained by serving a second master.

The rules above stated, are those which appear to be essential in every case of transfer. But, in addition to these requisites, certain formalities have been prescribed for transferring parish apprentices since the 1st of October 1816. From that day, the masters of parish apprentices have not been permitted to assign them, without the consent of justices. (5) In considering therefore the mode by which

(1) *Gray v. Cookson*, 16 East, 27.

(2) *R. v. Evered*, 16 East, 27.

(3) See in *R. v. Evered*, 16 East 28, what is said by Aston J.

(4) *R. v. Hindringham*, 6 T. R. 557.

(5) Stat. 56 Geo. 3. c. 139. s. 9.

apprentices are to be transferred, we must make this division of the subject. First, we are to consider the transfer of common apprentices up to this time, together with the transfer of parish apprentices up to the 1st of October 1816. Secondly, we are to consider separately, the transfer of parish apprentices since that day.

Of the transfer of common apprentices at the present day, and of the transfer of parish apprentices to the 1st of October 1816. By a particular consent on the part of the first master. Expressed either by word of mouth, or in writing. If in writing it must be stamped. Of the stamp.

First, a parish apprentice might before the 1st of October 1816, and a common apprentice might at any time, and still may be transferred from one master to another, by what has been called a particular consent on the part of the former. This consent may be expressed either in words, (1) or in some more formal manner, as by an assignment on the back of the indentures, or by any other agreement in writing between the master who transfers, and the master who receives the apprentice. Only we must observe, that since the statute 23 Geo. 3. c. 58., such an assignment or agreement must be stamped.

From 1783 to 1804, it must have been stamped with an agreement stamp, the duty on which was six shillings. (2)

From 1804 to 1808, a duty of 15 shillings was imposed upon every assignment of indentures of apprenticeship, except in the cases of parish bindings or of those under public charities. (3)

From the 10th day of October, 1808, (4) to the 31st of August 1815, the indenture, or other instrument, which transferred an apprentice to a new master, was, if a new consideration, exclusive of the former one, moved to the new master, charged with a duty upon the same scale as that laid down for the original consideration. (5) Where no fresh consideration moved to the new master, if the indenture or other instrument contained not more than 1080 words, there was a duty of fifteen shillings; if it did contain more, a duty of 1*l.* 10*s.*

From the 31st of August 1815, and at the present day, (6) any instrument transferring an apprentice to a new master, has been and is charged with a duty upon the same plan; that is to say, upon the amount of fresh consideration, if one moved to the new master, and according to the same scale which regulated the original consideration. (7) And if there is no new premium, then the same duty as upon an original binding in which there is no premium. (8)

And under both these latter statutes, that is to say, since the 10th of October 1808, all assignments of appren-

(1) See Part II. Chap. II.

(3) Stat. 44 Geo. 3. c. 98. Sched. A.

(4) Stat. 48 Geo. 3. c. 149. Sched. Part I.

(6) Stat. 55 Geo. 3. c. 184.

(2) Stat. 23 Geo. 3. c. 58. s. 1.

(5) See page 40.

(7) See page 41.

(8) Ibid.

tices who were bound by or at the sole charge of any parish, or by or at the sole charge of any public charity, or pursuant to the statute 32 Geo. 3. c. 57., have been exempted from all duty, provided there has been no fresh consideration, exclusive of any former one, given to the new master.

The transfer of an apprentice from a second master to a third, and so on, is subject to precisely the same rules as those which governed the original transfer, every subsequent master now standing in the place of the first. (1)

Secondly, a parish apprentice since the 1st of October 1816, can be assigned only by the consent of two justices. (2) This assignment is to be made in the manner prescribed by the statute 32 Geo. 3. c. 57. Which act enabled a master with the consent of two justices, testified by them under their hands, to assign a parish apprentice by indorsement on the indenture, or by other instrument in writing. The master, to whom the apprentice was assigned, was to signify his acceptance of the apprentice by indorsement on the counterpart, or by other writing. And he was, by that transfer and his acceptance of it, in the situation, and liable to all the covenants, of the first master. The statute 32 Geo. 3. was indeed confined to parish apprentices with whom only a limited premium had been given. But the statute 56 Geo. 3. is general. It applies to all parish apprentices. And further, the statute 32 Geo. 3. only enabled these assignments to be made, for the purpose of bringing the second master within the reach of all the covenants, and of placing him under the control of magistrates. It did not affect the question of settlement. That might be gained although the assignment was not made according to the statute. (3) But the statute 56 Geo. 3. enacts, that no settlement shall be gained by any apprentice who serves under an assignment, unless the assignment is sanctioned by the consent of two justices.

Of the transfer of parish apprentices since the 1st of October 1816. They must be transferred by consent of two justices, as prescribed by Stat. 32 Geo. 3. c. 57.

And will gain no settlement, unless the assignment is allowed by two justices.

Since the 1st of October 1816, therefore and henceforth, a parish apprentice must be assigned with such consent of justices as is directed by statute 32 Geo. 3. What then is that consent? If we look to the forms of assignment given by statute 32 Geo. 3. we shall find that the consent to be given by the justices is written under the assignment, whether that assignment is by indorsement on the indenture, or by a separate writing. (4)

(1) *R. v. East Bridgeford*, Burr. s. c. 133; *R. v. Clapham*, Burr. s. c. 266; *R. v. Tavistock*, Burr. s. c. 578.

(2) Stat. 56 Geo. 3. c. 139. s. 9.

(3) *R. v. Barleston*, 5 B. and A. 780.

(4) See Stat. 32 Geo. 3. c. 57. Sched. D. E.

Which consent must be under their hands.

But as these forms are not compulsory, (1) it is not necessary, either that the assignment should strictly follow them, or that the consent of the justices should be written under them. It is sufficient if the consent of justices is given in any way under their hands.

And the assignment to which they consent must be an assignment for the residue of the term.

The consent however, directed by the statute 32 Geo. 3. to be given, is to an assignment for the residue of the term. (2) The apprentice, therefore, in order to be regularly assigned, must be transferred for the whole period of service which remains unperformed.

An assignment by all subsequent masters must be effected in the same way.

With respect to an assignment by any master subsequent to the first, that by the statute 32 Geo. 3. c. 57. s. 7. is directed to be done in the same manner as an assignment by the first master; and as the statute 56 Geo. 3. adopts the mode of assignment pointed out by the former statute, this mode is now the only valid and effectual way in which any such subsequent assignment can be effected.

Of the residence.

III. The settlement of the apprentice is in that parish in which he has last completed a residence of forty days; provided such residence be referable to the apprenticeship; provided neither himself, nor the master to whom he is bound, nor the master whom he is serving, have the character of a certificated person in that parish; and provided the master, under whom he claims a settlement, be not a toll-collector.

A residence under an apprenticeship is governed by nearly all the same rules as a residence under a hiring and service.

It must be in some one parish for forty days.

I. In both cases the residence determines the place of settlement; and an apprentice, whatever length of time he may have served his master, will not have completed his title to a settlement under the indentures, unless there be some particular parish in which he has resided forty days.

It must be a residence with a view to the service.

II. In both cases the residence must be with a view to the service, and not *diverso intuitu*. The residence of the apprentice must be referable in some way to the apprenticeship. It must be a residence under the indentures.

Not a residence solely on account of illness.

Now suppose the apprentice is ill, and goes to a hospital or to his friends, in another parish, for the purpose of being cured; and suppose that while residing there for that purpose, he does not perform any service to his master. (3) Such a residence has nothing to do with the apprenticeship, and cannot therefore enure to give the apprentice a settlement in that parish.

But if, while residing in such parish, he go to his master and perform any service for him; or if, though unable to

(1) Stat. 32 Geo. 3. c. 57. s. 7.

(2) Sect. 7.

(3) *R. v. Barmby*, 7 East, 381.

work, he attend his master, by which attendance he may be learning the trade; then the case is altered, and he gains a settlement in the parish in which he sleeps, although he was in fact sent to that parish with a view to being cured. (1)

Suppose next that the apprentice has been living under an assignment, or in any other way, with a second master, in a different parish from that in which the first master lives, and that, being ill, he is sent back to the first master. The first master puts him to his friends in the same parish, but the apprentice does not work for the master. In this case too, it has been held that the residence is referable to the apprenticeship, as being in the master's parish. (2)

Unless such residence be in his master's parish.

There may be other causes besides illness which induce a master to send away his apprentice, or which prevent the apprentice from continuing in the master's service. A master, for instance, not wanting his apprentice, allows him to go back to school. In this case there is a relinquishment of the service during all the time that the apprentice is at school. His residence there has nothing to do with the apprenticeship. (3)

Nor a residence in another parish for any other purpose except that of serving under the indentures.

Take another instance: an apprentice, who has been employed in his master's service at a distance, comes back to his master's parish, but not to his master's house; and while he remains there, does not work for the master. In this case, too, he is not residing under the indentures. (4)

Nor a residence even in the master's parish, if such residence be unknown to the master, or unsanctioned by him.

Suppose next this case: an apprentice, living with his master, goes to his friends in another parish, by his master's permission, every Saturday and Sunday night. This sleeping out of the master's parish is by indulgence only, and not for the purpose of the apprenticeship. If, therefore, the apprenticeship terminate on a Sunday night, the apprentice is, notwithstanding, settled in the master's parish. (5)

Nor a residence of two days in the week in another parish, by the indulgence of the master.

This doctrine is somewhat opposed to what was thrown out, though not decided, in a former case; (6) in which it was supposed, that if the last moment of the service had been on a Monday, then the apprentice would have been settled in the parish, where, by the master's indulgence, he slept on the Sunday night. But as, under the circumstances of that case, the last moment of the service appeared to be on Saturday, it was decided, for that reason, that the settlement must be in the master's parish.

(1) *R. v. Stratford-upon-Avon*, 11 East, 176.

(2) *R. v. Charles*, Burr. s. c. 706.

(3) *R. v. St. Mary Bredin*, Canterbury, 2 B. and A. 382.

(4) *R. v. Smarden*, 13 East, 452; and see *R. v. Topsham*, 7 East, 466.

(5) *R. v. Ilkeston*, 4 B. and C. 64.

(6) *R. v. Ribchester*, 2 M. and S. 135.

Notwithstanding what was thrown out in the last-mentioned case, the general principle, that a residence of this nature, by the indulgence of the master, is not to be considered as a residence under the indentures; this principle was, I say, so broadly laid down in the case of *R. v. Ilkeston*, that, even if the apprenticeship had terminated on Monday, it would probably be now held that the settlement of the apprentice was not in that parish, where, by the mere indulgence of the master, he slept on Sunday night.

It has been said, that if a vessel *in transitu* were accidentally to stop at a port to repair a leak, or upon any such *casual* occasion, an apprentice, remaining there under those circumstances, would not gain a settlement in the parish to which the port belongs. (1) Whether this be so or not, is somewhat doubtful; but there can be no doubt, that if the master's ship go into a port for any purpose, which is not a *casual* purpose, as for the purpose of trade or the like, a residence there for forty days will confer a settlement upon the apprentice. (2) In this case he is actually serving the master in the parish to which he goes; and he is in like manner doing so, when both the master and apprentice, having to serve in the militia, go to another parish, the master not consenting to give up the indentures during all the time that the service in the militia is going on. (3)

A residence on board a ship in any port or harbour, is a sufficient residence.

So is a residence with a master serving in the militia. The settlement is in that parish, where the apprentice has last completed a residence of forty days.

The forty days may be spread over the whole time of service.

III. It is pretty evident, from the examples which have been given, what is meant by the apprentice having *last* completed a residence of forty days. As in the case of a hiring and service, the settlement may be continually shifting, and is fixed in that place where he passes the last night of his service, provided that night complete the number of forty.

IV. There may be a question, within what time the forty days should be comprised?

The forty days required to give a settlement to a hired servant, must have occurred within the compass of a year. (4) No such rule has been established in the case of an apprentice; and it would perhaps be held, that the forty days may be spread over the whole period of his service. There do not arise in this case the same inconveniences, which led to the establishment of the rule respecting the residence of a servant. (5)

The residence must be in a

V. This residence of forty days must be in some parish in which neither the apprentice himself, nor the master to

(1) By Asten J., in *R. v. Burton Bradstock*, Burr. s. c. 537.

(2) *R. v. Topsham*, 7 East, 466.

(4) See page 30.

(3) *R. v. Chelmsford*, 3 B. and A. 411.

(5) See *R. v. Denham*, 1 M. and S. 221.

whom he is bound, nor the master whom he is actually serving, has, during any part of the forty days, the character of a certificated person. For the certificate, as long as it subsists, is a complete protection to the parish for which it was intended. If therefore, while a certificate remains in force, the certificated master either takes up his abode in another parish, leaving his apprentice to sleep in the certificated parish; (1) or assigns his apprentice to any other person living in the certificated parish; (2) or if the apprentice, though not originally bound to a certificated man, is transferred to one; (3) in each of these cases he is debarred from gaining a settlement in the parish to which the certificate was directed. (4)

parish to which neither the master nor the apprentice came with a certificate.

VI. Although the binding, the service, and the residence be completed according to the foregoing rules, there is yet one proviso, which remains to be observed upon. It is this: that if the master be a toll-collector, no settlement can be gained by his apprentice. And the protection in this case is not confined to the parish in which the master lives, but is a general protection to all parishes, as long as the master's character of toll-collector continues to subsist. (5)

If the apprentice be apprentice to a toll-collector, he cannot gain a settlement.

CHAP. IV.

Of Settlement by Renting a Tenement.

THE stat. 13 and 14 C. 2. e. 12. s. 1., made it lawful for justices to remove, within forty days, all such persons as came to settle upon tenements of less yearly value than ten pounds, provided they were likely to be chargeable to the parish.

Origin of a settlement by renting a tenement.

Under this act, therefore, until the first year of James the Second, if any person whatever remained forty days in a parish, that parish was the place of his settlement. For the place of a man's settlement is that parish to which he could properly be removed. And if any one, who had resided in the parish of Dale for forty days, came into another parish, and was likely to become chargeable there, he might be removed to the parish of Dale, as being the place where he had last inhabited, by the space of forty days. (6)

(1) *R. v. Spotland*, Burr. s. c. 529, 530.

(2) *R. v. Hinckley*, 4 T. R. 371.

(3) *R. v. Romsey*, Burr. s. c. 640.

(4) See *R. v. Romsey*, Burr. s. c. 640; *R. v. Hinckley*, 4 T. R. 371; *R. v. Spotland*, Burr. s. c. 527; *R. v. Petham*, Burr. s. c. 154. And, on the subject of certificates, see page 32.

(5) Chap. I. p. 3.

(6) Stat. 13 and 14 C. 2. c. 12. s. 1.

In the first year of James the Second, an act (1) passed, by which it was enacted, that the forty days, intended by the act of Charles the Second to make a settlement, should not begin to run until notice of the person's coming into the parish was given to one of the parish officers.

But this provision in the statute of James the Second did not apply to any person who rented a tenement of the yearly value of ten pounds. Such person, therefore, stood in the same situation as if this statute had never passed; that is, without any notice, and merely by the force of the statute of Charles, he acquired, at the end of forty days, a settlement in the parish.

The subject of renting a tenement divides itself into three parts. First, is to be considered a renting before the statute 59 Geo. 3. c. 50. Secondly, a renting since that statute, and before the statute 6 Geo. 4. c. 57. Thirdly, a renting at the present time.

1. Of a settlement by renting before the stat. 59 Geo. 3. c. 50.
Definition of a settlement by renting before stat. 59 Geo. 3.

I. Before the statute 59 Geo. 3. c. 50., that is, before the 2nd July, 1819, any person, with the exceptions mentioned in the first Chapter, (2) might, by renting a tenement of the yearly value of 10*l.*, and by residing for forty days in a parish, within which some part of the tenement lay, acquire a settlement in that parish.

Which proposition is to be thus divided: i. Any person, with the exceptions above alluded to, might acquire a settlement in this way. ii. It is to be ascertained what is meant by this word tenement, and what interest in such tenement was necessary to confer a settlement. iii. There must have been a renting. iv. The tenement was to be of the yearly value of 10*l.*, and such yearly value was to be estimated at the time the party came to settle upon it. v. It might lie in different parishes. vi. The party, in order to gain a settlement, must have been in the actual enjoyment or occupation of the tenement for forty days; and, vii. He must have resided for forty days in a parish which contained some part of the tenement.

Who might acquire a settlement by renting.
A soldier.
A foreigner.

I. Any person, with the exceptions stated in the first Chapter, might acquire a settlement in this way.

Thus, for instance, a soldier, (3) who is not *sui juris*, to make a contract of service, and a foreigner, (4) who is not permitted by law to take a lease of a dwelling-house or shop, might respectively gain a settlement, by occupying a tene-

(1) Stat. 1. J. 2. c. 17., revived and enlarged by stat. 3 W. and M. c. 11. s. 3.

(2) Pages 2, 3.

(3) *R. v. Brighthelmstone*, 1 B. and A. 270.

(4) *R. v. Eastbourne*, 4 East, 103.

ment of the proper yearly value. And persons residing under certificates, who are disabled, in many ways, to gain a settlement in the certificated parish, were specially permitted to acquire one by renting a tenement. (1)

11. It is to be ascertained what is meant by the word tenement, and what interest in such tenement was necessary to confer a settlement. A certificated person.
Meaning of the word tenement.

The word tenement includes not only all inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; as rents, estovers, commons, or other profits whatsoever granted out of lands; or uses, offices, dignities, which concern lands or certain places, &c., because all these savour of the realty. (2)

Therefore, renting the hay-grass and aftermath of a meadow, (3) renting fogg or aftergrass, (4) renting the flags or rushes growing in a pond, (5) are respectively a renting of tenements. And a contract for a growing crop is a personal contract in those cases only, where the bargain is for something in a state to be severed; as, for a crop of growing potatoes. (6) In all such cases no settlement can be gained. But where the party has a right to all the produce of the soil which may grow during the year, or part of the year, he has a continuing interest in the soil, and the subject matter of the contract is therefore a tenement. (7) Instances of different tenements.
Growing crops, provided the contract be a continuing one, and not merely for crops in a state to be severed.

In like manner, a cattle-gate, (8) a right of common in gross, (9) a right to take sand and gravel from the bed of a river, (10) a fishery, (11) a wind-mill, (12) a water-mill, (13) a rabbit-warren; (14) and this, although the party have no right except that of entering and killing the rabbits; (15) and tolls, (16) except those specially excluded by Act of Tolls. Right of common in gross.
Fishery.
Mills.
Rabbit-warren.
Tolls.

(1) Stat. 9 and 10 W. 3. c. 11.

(3) *R. v. Stoke*, 2 T. R. 451.

(5) *R. v. All-Saints, Cambridge*, 1 B. and C. 23.

(6) *Warwick v. Bruce*, 2 M. and S. 205.

(7) See *R. v. All-Saints, Cambridge*, 1 B. and C. 25.

(8) *R. v. Whitley*, 1 T. R. 137.

(10) *R. v. All-Saints, Derby*, 5 M. and S. 90.

(11) *R. v. Old Alresford*, 1 T. R. 358, in which case, from the fact of letting a fishery, the Court presumed that the soil passed along with it. Buller J. said, that he was by no means ready to allow that, if it had been any other kind of fishery, it would not have given a settlement.

(13) *Evelyn v. Rentcomb*, 2 Salk. 536.

(15) *R. v. Piddletrenthide*, 3 T. R. 772.

(16) *R. v. Chipping Norton*, 5 East, 239; *R. v. Bubwith*, 1 M. and S. 514; but note, that, as tolls lie in grant, they are not capable of being holden without deed. See *R. v. North Duffield*, 3 M. and S. 247; and *Wood v. Tate*, 2 N. R. 247.

(2) Co. Litt. 19. b.

(4) *R. v. Brompton*, 4 T. R. 348.

(9) *R. v. Dersingham*, 7 T. R. 671.

(12) *R. v. Butley*, Burr. s. c. 107.

(14) *Kinver v. Stone*, 1 Stra. 678.

Dairy of cows,
or feeding of
sheep.

Which, by the
contract, must
have been pas-
ture-fed.

Of the interest
which it was
necessary to
have in such
tenement.
A joint inter-
est, or a com-
mon interest
was sufficient.

Part of the te-
nement might
be underlet.

Parliament, (1) are respectively tenements, the renting of which would confer a settlement. And the hiring of the feeding of cows or sheep upon land is also a tenement. (2) In some cases, the cows to be fed were the property of the party who hired the pasturage; (3) in others, the property of the party who let the pasturage; (4) in others, again, the contract was only for the privilege of milking them. (5) But, in all cases, it was necessary that there should be a contract for the pernaney of the profit of land. (6) It was not necessary for the party renting to have an exclusive right to the pasture where the cows were fed. (7) Other cattle might be fed there. Nor was it necessary that the pasture should be specified. (8) But there must have been a contract for the cows or sheep to feed upon the land; for a contract to feed generally, under which they might be fed with green tares, bought in the market, would not be a tenement within the act. (9) The contract, moreover, must apply to *growing produce*. (10) A stipulation that the cows should be fed upon hay cut off the land, gave no such interest as amounted to a tenement. (11)

Next, as to the interest it was necessary to have in such tenement. Not only a several interest, but a joint interest, or a common interest was sufficient, provided the value of each joint tenant's or commoner's share was such as would confer a settlement, had the interest been a several one. (12) And whether A. and B. originally took a tenement together, or A. first took it, and then admitted B. to a share of the tenement, the effect was the same. A. and B. were both equally entitled to a settlement, provided, as before, the value was sufficient. (13) B. would, in such a case, be either a joint tenant with A., or his under tenant. In either capacity he might gain a settlement. (14) For A. taking a tenement of the proper value, might let off part of it to under tenants.

(1) The General Turnpike Act, stat. 13. Geo. 3. c. 84. See *R. v. Elvet*, 11 East, 93. stat. 3 G. 4. c. 126. s. 51. See page 3.

(2) *R. v. Piddletrenthide*, 3 T. R. 772; and the case of *R. v. Lockerly*, 2 Bott, 104, n. seems to be overruled.

(3) *R. v. Hollington*, 3 East, 113.

(4) *R. v. Tolpuddle*, 4 T. R. 671; *R. v. Darley Abbey*, 14 East, 280.

(5) *R. v. Stoke-upon-Trent*, 10 East, 496.

(6) See in *R. v. Darley Abbey*, 14 East, 283, what is said by Lord Ellenborough.

(7) *R. v. Hollington*, 3 East, 113.

(8) See *R. v. Darley Abbey*, 14 East, 280.

(9) By Lawrence J., in *R. v. Tisbury*, 2 Nol. 19; *R. v. Oswald Twissel*, mentioned by Bayley J., 2 B. and C. 163; and *R. v. Bardwell*, 2 B. and C. 161.

(10) *R. v. Sutton St. Edmunds*, 1 B. and C. 536.

(11) See in *R. v. Sutton St. Edmunds*, 1 B. and C. 540, what is said by Abbott C. J.

(12) *R. v. Marden*, Burr. s. c. 311.

(13) *R. v. Duns Tew*, Burr. s. c. 309; *R. v. Seamer*, 6 T. R. 554.

(14) See in *R. v. Seamer*, 6 T. R. 554, what is said by Lord Kenyon.

and yet not thereby lose his right to a settlement. (1) He satisfied the statute by renting the tenement.

III. There must have been a renting. That is, there must have been a taking or holding in the character of a tenant. The expression in the statute of Charles 2., (2) is, *coming to settle in*. Now, it has been uniformly adopted as the rule for construing the statute of Charles 2., as much as if the word had itself been inserted in the statute, that the *coming to settle in*, means, by *renting*, or *holding in the character of a tenant*. It is true, this word *renting* is not in the statute; but what is found in the subsequent statute 9 and 10 W. 3. c. 11., shows pretty well, how the statute of Charles 2 was understood. For the subsequent statute enacts, that no person, who shall come into any parish by a certificate, shall gain a settlement therein, unless he shall take a lease of a tenement of the value of 10*l.*, &c. Therefore, certainly this enactment was framed upon an understanding that the *coming to settle*, in the statute of Charles 2, meant; a taking under a letting or renting. (3)

The party must have taken in the character of tenant.

The question, therefore, in all cases, will be this: did the party occupy in the character of a tenant?

He could not take as tenant,

Now, in the first place, a man cannot occupy his own estate as a tenant. (4)

if it was his own estate;

Secondly, if it was a purchase, and not a renting, he could not be said to come to the tenement in that character. (5)

or if he purchased the lease;

Thirdly, if he occupied a tenement merely in the capacity of a servant, such occupation being only for the better and more convenient performance of his service to the master, he could not, thereby, acquire the character and rights of a tenant.

or if he occupied merely as a servant, for the more convenient performance of his service.

B. engaged to serve A. as a labourer, and had, in addition to his money-wages, a house, which himself and his family occupied, about one hundred yards from the house of A. In this case, the house was adjudged to have been allotted to B., for the more convenient performance of the service. It was something connected with the service; an appendage to it; and might "be compared to rooms allotted to a coachman over the stables of his master, or to an out-house; where, being a family man, it is more convenient that he

(1) R. v. Llandverras, Burr. s. c. 571; and see R. v. Newnham, Burr. s. c. 756.

(2) 13 and 14 Car. 2. c. 12. s. 1.

(3) By Lord Ellenborough in R. v. Bowness, 4 M. and S. 210; and see what is said by Abbott C. J. in R. v. Croft, 3 B. and A. 171, as to these statutes being considered together, being in *pari materid*.

(4) R. v. St. John's, Glastonbury, 1 B. and A. 481.

(5) R. v. Bowness, 4 M. and S. 210.

should be out of the dwelling-house; but that is nothing more than the occupation of the master." (1)

B. engaged himself as waiter at an inn, and at the same time agreed to have the tap, that is, the privilege of selling malt-liquors there. For the convenience of holding his liquors, he was also to have the exclusive use of a cellar belonging to the inn. The question was, whether the occupation of this cellar conferred a settlement. And it was decided, that it did not confer a settlement, for, that there did not appear to be any taking of the cellar as a tenant, but, that the use of it was only a privilege allowed him in respect of the principal thing, which was the hiring himself as a waiter. (2)

But if the tenement was not necessary for the convenient performance of the service, he might occupy it as tenant.

I will now mention some instances in which the thing enjoyed has been held to be unconnected with the service or employment, and not necessary for the convenient performance of it.

B. was hired as bailiff by A., and besides wages and other advantages, his master agreed, either to furnish him with two cows, or to allow him to hire two, which should be fed on the master's farm. B. hired two cows, which fed during the summer in the pastures of A. This pasturage being, as we have seen, a tenement, the question was, whether B. held it in such a manner as to entitle him to a settlement. And it was held, that he did so for the reason above given; namely, that the feeding of the cows could not be said to be in any way necessary to the convenient performance of the service. (3) No doubt, as Lord Ellenborough observed, "this case may be distinguished from that of servants having apartments in the houses of their masters for the better discharge of their duties to their masters." But it is not so easy to distinguish the following, which is called the herdsman's case, from *R. v. Kelstern* before adverted to. (4)

B. having a family, was appointed to be a herd to several persons who had a right of common upon a large and extensive waste. He accordingly entered upon his employment, and removed with his family to a house situate upon the common, where he resided. As a reward for his services, he was allowed the exclusive enjoyment of the said house, and of a parcel of meadow-ground adjoining thereto. It was adjudged that he occupied this house and ground in the character of tenant. (5)

(1) *R. v. Kelstern*, 5 M. and S. 136; and see *R. v. Chesbunt*, 1 B. and A. 473.

(2) *R. v. Seacroft*, 2 M. and S. 472.

(3) *R. v. Minster*, 3 M. and S. 276; and see *R. v. Benneworth*, 2 B. and C. 775; and *R. v. Cherry Willingham*, 1 B. and C. 626.

(4) *Supra*, note (1).

(5) *R. v. Melkridge*, 1 T. R. 598. It is true, that in *R. v. Kelstern* it was stated, as

Nor is the following case altogether free from difficulty.

A schoolmaster, who was removeable at the pleasure of the person who appointed him, occupied a house, which his predecessors had occupied. The house was not given him as part of his emoluments. He was held, under these circumstances, to be tenant at will of the house. (1)

Fourthly, if, by the contract between the parties, the benefit of the thing, taken or hired, is to accrue to the grantor, in this case, the grantee, not having the pernancy of the profits, cannot be said to take in the character of tenant.

Suppose, for instance, an agreement made between A. and B., that B. shall have 28*l.*, and the agistment of a cow upon A.'s land, in consideration of B.'s maintaining and lodging two of A.'s labourers; B. also engaging to employ the milk of the cow in their maintenance. Such an appropriation as this seems to show that the agistment of the cow is not a tenement in B. (2) But if, in the above contract, there is no such engagement on the part of B., to appropriate the milk to the use of A.'s labourers, then the whole benefit of the thing taken belongs to B., and it is a tenement in him. (3)

Fifthly, a party cannot be said to occupy as a tenant that which he has only a license to use for the purpose of manufacture.

B. rented of A. certain pointing places in a mill used for the manufacturing of needles, (4) and certain runners in a mill of the same kind. (5) In neither of these cases could B. be said to take part of the mill as a tenant. It was only a license to use a particular part of the machinery of it for the purpose of manufacture, and for no other purpose.

Nor, if B. had hired a standing place in one room of a mill, which had a steam engine, and had fixed there a carding-machine of his own, which was worked by the machinery of the engine, and was fastened to the floor and roof of the room, could he be said to occupy this as a tenant. For the substance of the agreement was, as in the former instances, a mere license to use the machinery of the mill and

If the party occupied for the benefit of the grantor, and not for his own, he had not the character of a tenant.

There could be no occupation as a tenant, of that which there was only a license to use in manufacturing.

part of the case, that the house was necessary for the performance of the service; and if this can be deemed a question of fact, it will account for the judgment in that case; for the sessions had already decided the question. Still, however, this difficulty attends the decision in *R. v. Melkridge*; that all which Lord Ellenborough says, in *R. v. Cheshunt*, 1 B. and A. 473, about turning out such a tenant, and all his reasoning *ab inconvenienti*, apply with equal force to *R. v. Melkridge*.

(1) *R. v. Lakenheath*, 1 B. and C. 531.

(2) See what is said by the Court in *R. v. Cherry Willingham*, 1 B. and C. 629.

(3) *R. v. Cherry Willingham*, 1 B. and C. 626.

(4) *R. v. Dodderhill*, 8 T. R. 449; and see the case in the notes there, 450, *R. v. Hammersmith*, in which case B. rented the grinding of so many loads of corn a week in A.'s mill, the corn to be ground at his own costs and charges.

(5) *R. v. Tardebigg*, 1 East, 528.

steam-engine; and the standing-place in the room, was nothing more than a place at which he might stand and work the machine; without which the contract would be absurd and nugatory. (1)

There are three more observations which are to be made upon this subject of renting, or holding as tenant.

The first is, that any sort of occupation as a tenant, even a mere tenancy at will, sufficed to give a settlement. (2)

A mere tenancy at will was sufficient to give a settlement.

No express contract was necessary.

An occupation by permission and consent, or even by mere indulgence was sufficient.

The second, that no express contract for the tenement was necessary. It was sufficient that the tenant occupied it with the landlord's permission and consent. For in such case, the law would imply a contract. (3) And even in cases where the party enjoyed the tenement by the mere indulgence of the landlord or owner, as in *Rex v. Fillongley*, (4) where the party occupied as long as his brother pleased, and was to pay no rent; and in *Rex v. Benneworth*, (5) where the party, having stipulated for the feed of a cow on his master's land, had not, while the cow was so fed, a tenement of 10*l.* a year; but, the cow having failed in milk, had then, through the kindness of his master, and not in consequence of any bargain, two heifers kept for him instead of the cow, by which change the tenement, if it was one, amounted to 10*l.* a year; even in cases of this nature, it has been held that the occupier was sufficiently clothed with the character of tenant.

Nor was it necessary that there should be any rent.

The last observation to be made is, that it was in no case necessary that a rent should be paid in money, or indeed that there should be any rent at all. (6) The tenant might pay in service, (7) or he might occupy the tenement rent-free. (8)

The tenement was to be of the yearly value of 10*l.*

That is, of the value of 10*l.* if let by the year. Value a question of fact.

iv. The tenement was to be of the yearly value of 10*l.*, and such value was to be estimated at the time the party came to settle upon it.

By the yearly value, is to be understood the value of the tenement, if let by the year. (9)

This value is a matter to be inquired into and finally determined by the sessions. The rent may afford them a criterion for ascertaining the value. But as on the one hand, a tenement not worth 10*l.* a year may be let for that sum or a larger one; (10) so on the other hand, the rent being

(1) *R. v. Mellor*, 2 East 169.

(2) *R. v. Fillongley*, 1 T. R. 460; see *R. v. All-Saints, Derby*, 5 M. and S. 90; *R. v. Lakenheath*, 1 B. and C. 531; *R. v. Chediston*, 4 B. and C. 230.

(3) *R. v. Netherseal*, 4 T. R. 258.

(4) 1 T. R. 460.

(5) 2 B. and C. 775.

(6) See in *R. v. Benneworth*, 2 B. and C. 778, what is said by the Court.

(7) See *R. v. Melkridge*, 1 T. R. 598; *R. v. Whixley*, 1 T. R. 137; *R. v. Cherry Willingham*, 1 B. and C. 626; and *R. v. Minster*, 3 M. and S. 276.

(8) *R. v. Fillongley*, 1 T. R. 460.

(9) By Lord Ellenborough in *R. v. Hellingly*, 10 East, 44.

(10) *R. v. Southwold*, Burr. s. c. 140; *R. v. Hellingly*, 10 East, 41.

under 10*l.* a year, a value may be proved beyond the rent paid, so as to bring the tenement up to that amount which was required for a settlement. (1) The rent therefore is but evidence of the yearly value; one medium through which it may be ascertained; and only conclusive where nothing appears to the contrary.

The rent only evidence of the value.

In the next place, we may observe that the tenement need not in fact have been let for a whole year. (2) It might be let only by the week or the day. (3) And whether a tenement of the yearly value of 10*l.* so let, would confer a settlement, depended upon the time for which the tenant occupied it. (4)

The tenement might be let by the week or day.

In the third place, the value of the tenement is to be estimated at the time of the party coming to settle upon it. (5)

The value was to be estimated at the time the party came to settle upon it; that is, at the beginning of his lease, if for years; at the beginning of any one year, if it was a lease from year to year.

Now at what time is a party said to come and settle upon it? Why at that time when he actually and corporeally begins his tenancy. In the case therefore of a lease for years, the time at which the estimate of the value must be made, is the time when the tenant entered upon the tenement, not sooner or later. (6) But in the case of a lease from year to year, every new year is considered as a new lease. And if the tenement was of the value of 10*l.* a year, at the beginning of any one year during the tenant's occupation, he might thereby gain a settlement. (7)

The above rule, as to the time of estimating the value, suggests two others:

First, that whatever labour was bestowed, whatever improvements were made upon the tenement, might be taken into the account of its value, if they took place before the party came to settle upon it. And this rule extends not only to ploughing, digging and manuring, (8) but even to sowing for the purpose of a crop. (9)

Improvements made before the party occupied, might be taken into the account; but not such as were made after his occupation had begun.

The second rule is, that whatever labour was bestowed upon the tenement after the tenant's coming to settle upon it, could not be taken into the account to increase its value. (10)

In the fourth place must be noted a rule which seems to have no foundation in good sense or reason, but to rest merely upon authority as its basis. It is this; that if the landlord paid those taxes, which are usually deemed tenant's

(1) *South Sydenham v. Lamerton*, 2 Bott, 112; *R. v. Bilsdale Kirkham*, Burr. s. c. 828.

(2) *R. v. Ringwood*, 1 M. and S. 381.

(3) By Lord Ellenborough, in *R. v. Hellingly*, 10 East, 44. (4) See page 73.

(5) By Lord Ellenborough, in *R. v. Hellingly*, 10 East, 44.

(6) See in *R. v. West Cramore*, 2 M. and S. 134, what is said by Lord Ellenborough.

(7) *R. v. Bilsdale Kirkham*, Burr. s. c. 833.

(8) *R. v. Ringwood*, 1 M. and S. 381; *R. v. West Cramore*, 2 M. and S. 132.

(9) *R. v. Purley*, 16 East, 261.

(10) See the cases in note 9, and observe what is said by Le Blanc J. in *R. v. Ringwood*, 1 M. and S. 385.

Payment of tenant's taxes by the landlord, not to be deducted in computing the yearly value.

taxes, such payment was not to go in diminution of the value.

If, for instance, A. the landlord had let a tenement to B., at the rent of 10*l.* a year, and had agreed to pay all taxes rates and charges, and if this rent of 10*l.* were proved to be the annual value on the supposition that no taxes existed; then, according to the rule, the amount of the taxes was not to be deducted from the 10*l.* in estimating the value of the tenement. (1)

No inquiry necessary, as to the credit given to the lessee.

In the last place, it is not in any case necessary to inquire how far credit for the rent was given to the person renting the tenement.

A settlement might be gained, although there was security given by a third person for the rent.

We find that the notion was, in some cases, entertained that the credit given to the party was a test by which the question of settlement, or no settlement, was to be determined. (2) But if this be adopted as a principle upon which settlement cases of this kind are to be determined, it will tend to impeach some established cases, and lead to many false and dangerous conclusions. In cases where a guarantee or security has been given for the payment of the rent, the tenant undoubtedly has not full credit given to him for the rent. Yet this circumstance has never prevented a settlement being gained. (3) It seems, therefore, that no reliance can be placed upon the test afforded by the credit given to the tenant. It might have been a reason for the enactment in the statute 13 and 14 Car. 2 c. 12, which perhaps proceeded upon this assumption, that a person, who had sufficient credit to procure a tenement of 10*l.* a year, was not likely to become a burthen to the parish. And indeed Lord Chief Justice Parker said, that this was the reason of the statute. (4) But the moment that statute passed into a law, the only inquiry should have been into the real actual value of the tenement estimated by the yearly rent which ought to be paid for it. And this, I think, is now settled to be the only proper ground of inquiry. (5)

The tenement might be in different parishes. And though rented of several, it was but one tenement in the lessee.

v. The tenement might lie in different parishes.

It was formerly made a question whether renting two distinct tenements, as, for instance, one, worth 4*l.* a year, of A. and another worth 6*l.* a year, of B., constituted such a renting as would satisfy the statute. But it was without difficulty decided that, though rented of several, it was but one tenement in the lessee. (6)

(1) *R. v. Framlingham*, Burr. s. c. 748, 752; *R. v. St. Paul's Deptford*, 13 East, 320.

(2) *R. v. Framlingham*, Burr. s. c. 752; and it is hinted at by Lord Ellenborough, in *R. v. St. Paul's Deptford*, 13 East, 321.

(3) *R. v. Butley*, Burr. s. c. 108; *R. v. Hooe*, 4 East, 362.

(4) In *South Sydenham v. Lamerton*, 2 Bott, 130.

(5) See *R. v. Hooe*, 4 East, 362.

(6) *North Nibley v. Wootton under Edge*, 2 Bott, 115; *R. v. St. Margaret, Fish Street*, 2 Bott, 120.

It was said by the Court in *South Sydenham v. Lamerton*, (1) that "if the tenement be entire, and the house in one parish, and part of the land in another, this may be called a tenement of 10*l.* per annum in that parish where the house is;" but that "two distinct tenements in two parishes, making together 10*l.* per annum, will give no settlement." But this was merely an *obiter dictum*. And it has been since decided that two distinct tenements, one being in one parish, and the other being in another parish, were a sufficient tenement within the act. (2)

VI. The party, in order to gain a settlement, must have been in the actual enjoyment or occupation of the tenement for forty days. The following case will show the meaning of this rule:

A butcher agreed for the occupation of a stall in Reading Market. The stall was a permanent building with a door having a lock, and the butcher kept the key of it. But he had a right of access to the stall on two days only in the week. Having used the stall in this way for only nineteen weeks, he was held to have occupied it but for thirty-eight days. (3)

From the above case, and particularly from what was said in it by Bayley J., it appears that a tenement, which was to be enjoyed or occupied interruptedly, would nevertheless confer a settlement under the statute of Charles the Second, and that the forty days were not required to be forty consecutive days.

VII. The party must have resided forty days in a parish which contained some part of the tenement. And it was at one time thought, that such residence must be an actual residence upon some part of the tenement. (4) But this was an erroneous impression. And it is now decided that a residence in any part of the parish was sufficient. (5)

II. From the 2d of July 1819, to the 22d of June, 1825, any one who rented a tenement, consisting either of a distinct and separate dwelling-house or building, or of land, or of both, *bond fide* hired by him for the sum of 10*l.* a-year, at the least, for the term of one whole year, who held such dwelling-house or building, or occupied such land, and paid the rent for one whole year, obtained at the end of the year a settlement by residing forty days in the parish in which the whole tenement was situated. (6)

In order to gain a settlement within the period above-mentioned, the party must,—1. Have *bond fide* hired for a

Of the occupation. It must have been an actual occupation for forty days.

The forty days were not required to be consecutive.

Of the residence.

II. Of a settlement by renting, under stat. 59 Geo. 3. c. 50. Definition.

Requisites to gain a settle-

(1) 1 Stra. 57. (2) *R. v. Sandwich*, Burr.s. 46; and see *R. v. Fillongley*, 1 T. R. 458.
 (3) *R. v. Caversham*, 4 B. and C. 683.
 (4) By Bayley J., and Best J., in *R. v. Bardwell*, 2 B. and C. 162, 164.
 (5) *R. v. Kenardington* 6 B. and C. 70.
 (6) Stat. 59 Geo. 3. c. 50.

ment under stat. 59 Geo. 3. year, at the rent of 10*l.* at least, a tenement lying in the parish; which tenement might consist either of a dwelling-house or some other building, or of land, or of both; II. must have held such dwelling-house or building, or have occupied such land, for a year; III. must have paid a year's rent for it; IV. must have resided in the parish forty days during the time he had such tenement.

All of which were conditions precedent. These were so many conditions precedent to his gaining a settlement. If any one of them failed of being in its legal meaning performed, a settlement could not be obtained.

I. He must have *bona fide* hired for a year, at the rent of 10*l.* at least, a tenement lying in the parish; which tenement might consist either of a dwelling-house or other building, or of land, or of both.

Meaning of the word tenement, how far limited by this act. With regard to the subject-matter, namely, a tenement, the same construction is to be put upon that word as before this statute passed, except in as far as this statute altered or abridged the meaning of the word. Now, before this statute, if A. had taken land of one person and a house of another, and at different times, though different tenements in those persons of whom they were taken, they nevertheless formed but one tenement in A. There is nothing in this statute which introduced an alteration in this respect. A tenement, therefore, might still consist of different parcels, taken at different times and of different persons. (1)

Now, as to the limitations introduced by the statute:

To be all in one parish. First, the tenement which would confer a settlement was to be all in one parish; by which is to be understood, so much of the tenement as would yield a rent of the proper amount.

If A. had rented land, of which part was in one parish and part in another parish, at 15*l.* a-year, he might, I apprehend, be permitted to show that the part which lay in the parish where he lived, was, in effect, hired for the sum of 10*l.* a-year.

To consist of land & buildings only. Secondly, the tenement was confined to buildings and land.

The building, &c., to be separate and distinct. Thirdly, the dwelling-house or building was to be separate and distinct. It was not sufficient for A. to hire part of a house or part of a barn, unless the part of the house was so separated as that it might, in an indictment for burglary, have been charged to be the dwelling-house of A., or the part of the barn, or other building which he took, was disconnected with the other part by means of a partition-wall, and by having a separate entrance.

(1) R. v. North Collingham, 1 B. and C. 578.

So much for the subject-matter. Next, with respect to the term for which the hiring was to be made, this must have been at least a year : that is, the hiring by A. must have been such, that A. by the contract bound himself for the term of one year ; which year must, of course, have been a year in law. (1) And the hiring for a year was, in analogy to the case of hiring and service, a good hiring, notwithstanding there were conditions or stipulations introduced, which rendered it defeasible. (2)

To be hired for a year at least.

Next, as to the rent, that must have been at least 10*l*. And as long as it appears to have been a yearly rent, the mode adopted for paying it, whether by the week or by the month, was quite immaterial. (3)

At a rent of 10*l*. at least.

Lastly, as to the manner of taking, it must have been *bonâ fide*. Whatever tended to show a fraudulent intention, vitiated the contract, and rendered it ineffectual for the purpose of a settlement. In this view, the value of the tenement, though in many other respects immaterial, would become important ; because the fact of agreeing to pay 10*l*. for that which was not worth that sum, would, in some cases, be very cogent evidence of a fraudulent intention.

And the hiring without fraud.

11. The party must have held such dwelling-house or building, or have occupied such land, for a year.

The house or building to be held, and the land to be occupied, for a year.

The statute made a distinction in the manner of enjoying the tenement, according to the difference in its nature. A house or building was to be *held* for a year ; land was to be *occupied* for a year. The land must have been in his own hands during the whole year. Of the house or building he might underlet, perhaps not the whole, but certainly a part, and in such manner that the whole house or building could still be charged as his house or building, in an indictment for burglary. (4) If the tenement consisted of land, there must have been a sole occupation by the person taking it. If A. took land, and then let B. occupy it with him jointly, A. could not gain a settlement. (5)

House, &c., might be underlet in part.

The taker of land to occupy it solely and exclusively.

But though a year was the term for which the tenement must have been held or occupied, it was not necessary for the holding or occupation to begin and end with the period for which the tenement was taken.

The holding or occupation might be under different hirings ;

Suppose that A., on the 1st of November, 1820, hired a tenement for a year from the preceding Michaelmas, and that at Michaelmas, 1821, he hired it for another year, continuing to hold or occupy the tenement till the 1st of Novem-

(1) See page 8.

(2) See *R. v. Herstmonceux*, 1 Man. and R. 426.

(3) *Ibid*.

(4) *R. v. North Collingham*, 1 B. and C. 578. See the judgment of Abbott C. J. 583.

(5) *R. v. Tonbridge*, 6 B. and C. 88.

and need not have been for the same year as the hiring. A year's rent to be paid by the tenant.

ber in this latter year. Now, in this case, the holding or occupation was under different yearly hirings, but was still sufficient to satisfy the statute, which did not require the holding or occupation to be for the same year as the hiring, but only that such holding or occupation should be for the term of one whole year. (1)

III. The party must have paid a year's rent for the tenement. (2)

No particular year, for which the payment was to be made, is specified in the statute. If, therefore, the party had paid rent for the tenement, in respect of which he claimed the settlement, any one year during the term of his holding or occupation, by such payment he apparently fulfilled this condition of the statute. (3)

A whole year's rent, whatever that rent might amount to, was to be paid in order to gain a settlement. A payment to the amount of 10*l.*, unless 10*l.* was the rent for a year, was not sufficient. (4)

The payment being either an actual payment or a payment in law.

This payment must have been either an actual payment, or what in law is equivalent to payment: as, for instance, if A. made a legal tender of the rent upon the premises before sunset or the last hour of the day when it became due, and could show that he had ever since been ready to pay it. (5)

And to be made by the person hiring the tenement.

And this payment must have been made by the person hiring the tenement; so that if he died before payment of the rent, although all the other requisites of the statute had been complied with, no settlement was gained. (6)

The tenant must have resided forty days in the parish.

iv. The party must have resided forty days in the parish during the time he had such tenement.

The statute says that no person shall gain a settlement by reason of dwelling forty days in any tenement, unless the tenement be of the description which it specifies, and be enjoyed in the manner which it points out. Therefore, under these restrictions, a settlement might be gained by residing forty days in the parish. But the settlement was not completed at the end of forty days, but only at the end of the year's occupation. (7)

Of a settlement by renting, under stat. 6 Geo. 4. c. 57.

III. From the 22d of June, 1825, any one who rents a tenement consisting either of a distinct and separate dwelling-house or building, or of land, or of both, *bond fide* rented by him in the parish, at the sum of 10*l.* a-year at the least,

(1) *R. v. Stow*, 4 B. and C. 87.

(2) *R. v. Carshalton*, 6 B. and C. 93; *R. v. Amptill*, 2 B. and C. 847.

(3) See what is said by Abbott C. J., in *R. v. Stow*, 4 B. and C. 89.

(4) *R. v. Ashley Hay*, Easter T. 1828. And see *R. v. Ramsgate*, 6 B. and C. 712.

(5) See what is said on this subject by Bayley J., in *R. v. Amptill*, 2 B. and C. 854, and also by Holroyd J., 855.

(6) *R. v. Carshalton*, 6 B. and C. 93.

(7) *R. v. Amptill*, 2 B. and C. 847.

for a whole year; which house, building, or land, he occupies under such yearly hiring, and actually pays the year's rent for the same, acquires, at the end of the year, a settlement in the parish where the tenement is situated, if he has resided forty days in the parish. (1)

Definition.

I. With respect to the tenement, the term for which it is to be hired, and the amount of rent, the same construction is to be made upon this statute as upon the one which it has superseded. (2) The taking, indeed, under the new act, instead of consisting, as it might under the former act, of several hirings, is perhaps to be confined to one. The tenement is to be occupied "under such yearly hiring;" an expression which seems to point at a single hiring, and not to include a plurality.

The tenement, the term, the rent, and manner of taking, are the same under this statute, as under stat. 59 Geo. 3.

II. The distinction between land and buildings is, in this statute, abolished; and the enjoyment of both must be by means of a personal occupation: so that, under this statute, no part of the tenement can be underlet.

Buildings as well as land must be occupied.

And as the occupation in this case is to be "under such yearly hiring," it seems probable that it was intended to begin and end with the year for which the tenement is rented. If this be so, this is another point in which the law has by this statute been changed.

No part can be underlet. The holding to begin and end with the year for which the tenement is hired.

III. With respect to the year's rent, which must be paid in order to gain a settlement, the statute, which I am now considering, seems, by its wording, to require that the rent paid should be for the same year for which the renting took place, that the party relies upon for his settlement; and this I have already shown is probably intended to be the same year for which the occupation must take place, that the party relies on. Therefore the three requisites, namely, the renting, the enjoyment, and the payment of rent, which under the former statute might be for different years, (3) must all concur, under this statute, in one single year.

Rent to be paid for the same year.

The rent is not required under this statute, as under the former one, to be paid by the person who takes the tenement. (4) This difference in the wording of the two acts does not, however, appear to be very material. For the payment of rent is still a condition precedent to the gaining of a settlement. And if the tenant were to die before the rent was paid, he could not be considered as having acquired a settlement, although the rent might afterwards be paid out of his effects. (5)

The rent need not be paid by the tenant.

But he does not gain a settlement until it is paid.

(1) Stat. 6 Geo. 4. c. 57. s. 2.

(2) See page 74, &c.

(3) See *R. v. Stow*, 4 B. and C. 87.

(4) *R. v. Kibworth Harcourt*, *Sittings in Banc.* before Hil. T. 1828.

(5) *R. v. Carshalton*, 6 B. and C. 93.

The rent paid must be a whole year's rent, whatever may be the amount of rent reserved. (1)

There must be a residence of forty days in the parish.

iv. There must be under this, as well as under the former statute, a residence of forty days in the parish.

The act, it is true, does not speak of this residence. But as a forty days' residence was always required to complete a settlement by renting; as all statutes relating to the same subject must be construed together; and as no other alteration in the old law must be deemed to have been made, other than what is expressly specified in this later statute: for these reasons, a residence of forty days seems to be still necessary. Otherwise this anomaly would occur; that a party, merely by occupying land in a parish, which he may do without living in the parish, might gain a settlement there, without having slept for a single night within the bounds of the parish.

CHAP. V.

Of Settlement by Payment of Rates.

Foundation of a settlement by rating.

A SETTLEMENT by virtue of being rated, and of contributing to the public rates of a parish, took its origin from the statute 3 W. and M. c. 11. s. 6., by which it was enacted that if any person, who comes to inhabit in any town or parish, is charged with and pays his share towards the public taxes or levies of the said town or parish, he shall be deemed to have a legal settlement there, though no notice in writing has been given to the parish. (2)

Division of the subject.

This subject divides itself into two parts, a rating in respect of a tenement, and a rating generally, not in respect of a tenement. And the former consideration is of a two-fold nature, a rating before the statute 35 Geo. 3. c. 101., and a rating since that statute.

I. By force of the statute of William and Mary above-mentioned, and from the time of passing that statute, or at least from the term of passing the statute 9 and 10 W. 3 c. 11., which restricted the former, up to June the 22d 1795, a settlement might be obtained according to the following proposition:

1. Definition of a settlement gained, by being rated for

Any one, except a certificated person, (3) being charged with, and paying his share towards the public taxes or levies of the parish, in respect of any tenement, whatever might be

(1) *R. v. Ramsgate*, 6 B. and C. 712; and see page 76.

(2) See page 64.

(3) Stat. 9 and 10 W. 3. c. 11.

its value, acquired a settlement by residing forty days in the parish after such payment.

II. From the 22nd of June 1795, to the 22nd of June 1825, a settlement might be acquired according to the following proposition :

Any one, except a certificated person, (1) being charged with, and paying his share towards the public taxes or levies of the parish, in respect of a tenement of the yearly value of 10*l.*, acquired a settlement by residing forty days in the parish after such payment. (2)

On the 22nd of June 1825, the acquiring a settlement by the rating of a tenement seems to have been virtually abolished; for it can now only be acquired in virtue of such a tenement, and by fulfilling such conditions as would effect a settlement by renting. (3)

I shall first lay down such rules as apply with equal force to both the periods above mentioned.

Of which rules the first is, that it was not sufficient to pay rates without being rated, nor to be rated without paying. (4) Both were necessary. Thus for instance, if A.'s landlord or predecessor was the person who stood rated in the rate-book, A. was not entitled to a settlement by paying that rate. (5)

On the other hand, if A. was the person rated, but another upon his own account, and not upon A.'s account, paid the rate; A., in this case too, did not gain a settlement. (6)

The second rule is, that the rating must have been *before* the payment.

A. paid the rate, and afterwards his name was inserted in the rate. This was not a good rating for the purpose of gaining a settlement. (7)

The third rule is, that the person rated might be rated in any manner which sufficiently notified to the parish that he was rated.

Thus, for instance, if A. was rated as the "occupier of Black-acre;" (8) or if the rate was in the alternative in this way, "J. S. or tenant," J. S. being the landlord, and A. the tenant; (9) or if both the landlord's name and that of A. the tenant were inserted in this form :

Landlord
J. S.

Tenant
A.

so that it is doubtful upon whom the assessment was made; (10)

a tenement, under stat. 3 W. and M. c. 11.

2. Definition of a settlement gained, by being rated for a tenement, under stat. 35 Geo. 3. c. 101. Settlements by being rated for a tenement virtually abolished by stat. 6 Geo. 4. c. 57.

Of the rules which apply both to stat. 3 W. and M., and stat. 35 Geo. 3. The being rated, and the payment of the rate, are both necessary.

Of the rating. The rating must have been *before* the payment.

And must have been such as to notify to the parish the party's occupation of the tenement.

(1) Stat. 9 and 10 W. 3. c. 11.

(3) Stat. 6 Geo. 4. c. 57.

(5) R. v. Sarrett, Barr. s. c. 73; Kinver v. Kingswinford, Fol. 120.

(6) R. v. Weobly, 2 East, 68.

(8) R. v. Brightmen, 2 Burr. 1062.

(10) R. v. Mitcham, Cald. 276.

(2) Stat. 35 Geo. 3. c. 101. s. 4.

(4) Talbourn v. Boston, 2 Salk. 523.

(7) R. v. Edgbaston, 6 T. R. 549.

(9) R. v. Painswick, Barr. s. c. 465.

In all cases the occupation should have been known to the parish.

A party rated by mistake, might gain a settlement. So might one rated in a void rate.

Rating not confined to parochial taxes.

No settlement to be gained by means of the scavenger's rate, or the highway rate; the duties on houses or windows, or the assessed taxes. Of the payment. A payment in law sufficient. A payment, afterwards refunded by a third party, sufficient.

or if the house for which A. paid rates was rated thus, "Late Lowbridge's house," Lowbridge being the name of a former occupier, and the parish or parish officers being aware that A. was the actual occupier; (1) or even if the name of a former occupier, who had been rated by name, and not by description of the house, was continued in the rate, that former occupier being dead, and his death, together with the present occupation of A. being known to the parish; (2) in all these cases A. might gain a settlement by virtue of such rating.

And further, even if rated by mistake, he might nevertheless acquire a settlement, if the other essentials for that purpose had been complied with. (3)

The fourth rule is, that the rate itself need not have been in form, or in the manner of making it, strictly legal. Although laid too narrowly, (4) or even though void, (5) it did not prevent the party charged in it from gaining a settlement.

The fifth rule is, that the rate or assessment was not confined to parochial taxes; but other taxes, not strictly parochial, such as the land-tax for instance, might form the subject of the assessment. (6)

By particular statutes it is provided, that the payment of certain taxes shall not confer a settlement. This is enacted by stat. 9 Geo. 1. c. 7. s. 6., with respect to the scavenger's rate, and all assessments for the repairs of the highways; by stat. 18 Geo. 3. c. 26., with respect to duties on houses; by stat. 21 Geo. 2. c. 10. s. 13., with respect to duties on houses and windows; and by stat. 43 Geo. 3. c. 161., with respect to the assessed taxes.

The sixth rule is, that whatever amounted to a payment in law was a sufficient payment of the rate.

For A. might either in fact pay the rate himself, or constructively, by the hands of an agent. (7)

The seventh rule is, that although the sum, paid by the person rated, might be refunded to him by a third party, he might nevertheless gain a settlement by virtue of such payment.

A landlord might reimburse his tenant for taxes which the tenant had paid; (8) or the government might reimburse a public officer the taxes which had been assessed on him; (9) and in any such case the tenant or the officer might gain a settlement.

(1) *R. v. Walsall*, Cald. 35. If it is not known to the parish that A. is the occupier, A. cannot gain a settlement; *R. v. Llangammarch*, 2 T. R. 628.

(2) *R. v. Heckmondwicke*, Dougl. 564. (3) *R. v. Carhampton*, Dougl. 621.

(4) *R. v. St. Bees*, 9 East, 203.

(5) 19 Vin. Abr. 386; *St. Giles's, Cripplegate, v. St. Mary Newington*.

(6) See *R. v. Weobly*, 2 East, 70.

(7) By Lord Kenyon in *R. v. Weobly*, 2 East, 70.

(8) *R. v. Openshaw*, Burr. s. c. 522; 1 Bl. Rep. 463.

(9) *R. v. Okehampton*, Burr. s. c. 5; *R. v. Axmouth*, 8 East, 383.

The eighth rule is, that the person rated and paying the rate, must have been resident in the parish for the space of forty days after the time when he paid it. (1) By stat. 3 W. and M. c. 11., the being charged with, and the paying of rates, was substituted for public notice to the parish. The party, therefore, who, before that time, must have resided forty days *subsequent* to notice, was, from the passing of that act, required to reside forty days *subsequent* to such charge and payment of the rate. (2)

Of the residence. The party was to be resident in the parish for forty days after payment of the rate.

Next, as to the difference between a settlement gained during the former period, under the statute of William, and a settlement gained during the latter period, under the statute of Geo. 3. The only respect in which they differ is in the value of the tenement.

Of the change made by stat. 35 Geo. 3. c. 101.

In the former period a settlement might be gained whatever might be the value of the tenement.

In the latter, it could only be gained in respect of a tenement of the yearly value of 10*l*.

Before the year 1819, very few instances of gaining a settlement by being rated for a tenement of the value of 10*l*. would occur, because a tenement of the yearly value of 10*l*., would, in most cases, of itself confer a settlement, independently of the rating. (3)

But when the statute 59 Geo. 3. c. 50. passed, limiting the nature of the tenement, by the renting of which a settlement might be gained, it then happened that many tenements of the yearly value of 10*l*., which would not as such confer a settlement, did, if rated, enable the parties paying rates in respect of them, thereby to gain a settlement. (4)

During the former period, therefore, in addition to the eight rules above laid down, the only inquiry will be, what is a tenement? And this is a question that must be answered by looking back to the description and definition of a tenement given in a former chapter. (5)

Under stat. 3 W. and M. c. 11., any tenement was sufficient.

During the latter period, besides that inquiry, it must also be ascertained whether the tenement was of the yearly value of 10*l*., that is, of such value that it was worth 10*l*. to rent by the year. (6)

Under stat. 35 Geo. 3. c. 101., it must have been a tenement of the yearly value of 10*l*.

It is not necessary that the tenement should have been estimated in the assessment as of the annual value of 10*l*. It was sufficient if such could be proved to be its actual value. (7)

A less value might be stated in the rate. Fixtures be-

In the tenement will be included all that forms part of

(1) *R. v. Ringstead*, 1 Mann. and R. 448. (2) *Ibid*.

(3) See the judgment of the Court in *R. v. St. Pancras*, 2 B. and C. 126.

(5) Page 65.

(6) See page 70.

(7) *R. v. St. Dunstan's in Kent*, 4 B. and C. 686.

(4) *Ibid*.

longing to the landlord, and let with the house, were to be taken into the account in estimating the yearly value.

3. Of a settlement by rating in general.

the freehold. If therefore fixtures, belonging to the landlord, were parcel of the demise, their value was to be added to that of the house with which they were leased; and this, although they were fixtures of such a nature that, if they had belonged to the tenant, they might have been removed by him during the term. (1)

III. Of rating in general, not in respect of a tenement.

The statute of William and Mary, (2) which was in its terms of so general and comprehensive a nature, appears to embrace all rates whatsoever, which can fall under the meaning of the expression, "the public taxes or levies of the parish." It does not regard the subject matter in respect of which the rate is imposed, nor confine the gaining of a settlement to cases in which the party is rated in respect of a tenement. It follows, therefore, that the subsequent statutes, which restrict the gaining of a settlement in those cases where a tenement is the subject matter of the rate, do not affect those settlements which are claimed by virtue of a rate upon personal property. (3)

At this day a settlement may be gained by being rated for property which is not a tenement. Of the requisites for gaining a settlement in this way;
Rating;
Payment;
Residence.

At this day, therefore, a settlement may be gained by being rated in respect of any thing which is not a tenement.

In this case it is necessary that the party, for whom a settlement is claimed, should have been rated, should have paid the rate, and should have resided forty days in the parish after the time when he paid it.

I. With respect to the rating, all that has been said, in the former divisions of the subject, except so far as may relate to the nature of the thing rated, is applicable to the rating which is now under consideration. (4)

II. The same may be said of the payment; (5) and

III. Of the residence. (6)

CHAP. VI.

Of Settlement by Estate.

Foundation of a settlement by estate.

UPON these two rules, first, that no one could be removed from his own estate; second, that any one having lived upon his own estate for forty days became settled in the parish in which he so lived; upon these two rules, the first a principle of common law, solemnly recognized by Magna Charta, the

(1) *R. v. St. Dunstan's in Kent*, 4 B. and C. 686.

(2) 3 W. and M. c. 11, s. 6.

(3) See the second *Hcheater case*, 2 Peck 251, in which this was agreed by counsel on both sides.

(4) See pages 79, 80.

(5) See page 80.

(6) See page 81.

second an enactment of the statute 13 and 14 Car. 2. c. 12., the settlement, of which I am now treating, was originally founded.

Before the statute 9 Geo. 1. c. 7., which, as I shall hereafter show, mentions certain estates which are not to confer settlements, it was universally true that any one remaining upon his own estate, whatever that estate might be, for forty days, gained a settlement by virtue of that estate. From the time of passing that statute, living upon an estate irremovable for forty days, and gaining a settlement, have not, in all cases, been convertible terms; for the owners of such estates, as are the subject of the statute, are irremovable, but gain no permanent settlement in the parish. When therefore in any cases we find the expressions, gaining a settlement and being irremovable for forty days, used in this way, and the being irremovable made a criterion for determining the settlement of the party, we must bear in mind the qualification with which such a proposition is now to be received.

Since the stat. 9 Geo. 1. c. 7., being irremovable for 40 days and gaining a settlement, have not been, in all cases, convertible terms.

A settlement by estate is to be gained according to the following rule :

Any one, who by devise, by act of law, or by any conveyance except for a pecuniary consideration of less than 30*l.*, acquires any estate in fee-simple, fee-tail, or for life, or any existing term of years, in lands or tenements, whether freehold or copyhold, such person being either legally or beneficially entitled to such estate or term of years, and residing for forty days either upon such estate, or in the parish which contains it, thereby gains a settlement in that parish.

Definition of a settlement by estate.

There are three, and only three principal questions which can arise in all cases in which a claim is made to a settlement by estate. They are as follows :

The questions which may arise are,

First, what is such an estate as will confer a settlement? which is a question of law :

Second, was the person, for whom a settlement is claimed, entitled to such an estate? which is a question partly of law and partly of fact :

Third, has he resided forty days upon it? and this is wholly a question of fact.

1. As to the estate, what it must be to give a settlement ;
2. As to the title of the party ;
3. As to his residence upon the estate.

I. What is such an estate as will confer a settlement ?

For determining which question certain general rules may be laid down.

Of the estate.

1. With the exception of estates purchased for a sum less than 30*l.* (1) not only an estate in fee-simple, fee-tail, and every kind of life estate, but also any term of years, of which

All estates, except those purchased for less

(1) Stat. 9 Geo. 1. c. 7.

than 30l., will give a settlement. Whether freehold or copyhold. Provided the interest be an interest in land.

the party in possession is not the original lessee, even if it be a lease from year to year, (1) is sufficient to confer a settlement.

II. The estate may be freehold or copyhold.

III. It may be any estate whatever in lands. Whether an estate in all other tenements be sufficient, is a question of some doubt.

“Tenement is a large word, to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is seised *ut de libero tenemento*.” (2)

A rent out of a freehold is not sufficient, because it can give no right to live upon the freehold. A right of common would probably be sufficient. A reversion will give a settlement.

Now, in *R. v. Stockley Pomroy*, (3) Lord Mansfield seems to lay it down that a rent out of a freehold would not confer a settlement, because it would not give a right to live upon such freehold.

In *R. v. Warkworth*, (4) from what is said by Grose J., and Le Blanc J., it should seem that, in their opinion, a right of common, exercised by the party who had that right, would be sufficient for the purpose of a settlement.

With regard to a reversion, considerable doubt was at one time entertained whether that were sufficient to give a settlement. But it was finally agreed by the Court that if B., tenant for years; is in the occupation of premises, the reversion in which belongs to A., A., by residing in the parish, gains a settlement there. (5)

But not an advowson.

Next, let us suppose the case of an advowson. Would this confer a settlement? An advowson does not even stand upon the same ground as a right of common in gross exercised by the party to whom it belongs: for there is not, in the case of an advowson, the same reason for residing on the spot, as holds in the case of a common in gross. And some stress was by Lord Kenyon (6) laid upon the circumstance of there being a reason for residing in the parish where the property is situated. Where this reason does not exist, perhaps no settlement would be gained.

The estate may be legal or equitable, an estate in common, in co-parcency, or a joint estate.

IV. The estate may be either a legal or an equitable estate. And the party who has a legal or beneficial interest in any estate may acquire a settlement by virtue of it: and this, whether he be the only person interested in the estate, or whether he be one of several joint-tenants, parceners, (7) or tenants in common; for whatever is the title of one, is the title of all.

(1) *R. v. Stone*, 5 T. R. 295.

(3) *Burr. S. C.* 764.

(5) *R. v. Houghton-le-Spring*, 1 East, 247. See *R. v. Staplegrave*, 2 B. and A. 527.

(6) In *R. v. Houghton-le-Spring*, 1 East, 254. (7) *R. v. Dorstone*, 1 East, 296.

(2) *Co. Litt.* 6. a.

(4) 1 M. and S. 473.

There is very little difficulty attending cases which arise upon legal estates. I shall only mention some few instances in which the interest appears to be less direct or more remote.

"A guardian in *socage* has an interest in the ward's estate. The law considers him as entitled to the possession of the property." He is therefore irremovable. (1)

"A mortgagor has a right to the possession, till the mortgagee brings an ejectment. After the mortgagee has got into possession, he may then gain a settlement." (2)

An executor and an administrator, after probate or administration granted, have each of them a legal interest in any term of years which may come to either of them in their capacity of executor or administrator; and in that capacity may respectively gain a settlement. (3)

The husband has a legal interest in the wife's estate. If the wife be seised in fee, in tail, or for life, he gains by the marriage an estate of freehold in her right. If the wife has a term of years, he becomes possessed of this term in her right; (4) and, in either case, gains a settlement.

An adverse possession of twenty years confers a legal title upon the party who has for that period been undisturbed in the enjoyment of the estate. (5) He cannot, after the expiration of the twenty years, be dispossessed. And when that period is completed, it will be presumed that his possession originated under a title, which would have prevented him from being dispossessed in any one of those twenty years. (6) In any one of those years, therefore, a settlement might be gained. (7)

But the strict rules to be observed in the trial of ejectment, are not to be applied to settlement cases. And therefore uninterrupted enjoyment for a shorter time, as for instance 18 or 19 years, will be sufficient for the purpose of gaining a settlement; that is, it will warrant the presumption that a conveyance has been executed, and a legal title obtained. (8)

Suppose that A. makes an agreement for the sale of an estate, lives forty days upon the estate, and then executes a conveyance. During those forty days, the contract is executory; the legal estate is in A., and he gains a settlement by living upon it. (9)

I have before observed, generally, that whether a person be sole seised or possessed of an estate, or be one of several parceners, joint-tenants or tenants in common, he will have

Of legal estates.

A guardian in *socage*.

A mortgagee in possession.

An executor or administrator after probate, &c.

And a husband in right of his wife, have all such estates as will give them a settlement. So has a party with a good title in ejectment.

Or one who has possessed uninterruptedly for somewhat less than 20 years.

Or one who has agreed to sell his estate, but continues to live upon it.

(1) *R. v. Oakley*, 10 East, 491.

(3) *R. v. Stone*, 6 T. R. 295.

(5) *R. v. Bittou*, Burr. s. c. 631; *Ashbottle v. Wyley*, 1 Stra. 608.

(6) *R. v. Calow*, 3 M. and S. 22.

(8) *R. v. Butterson*, 6 T. R. 554.

(2) *R. v. St. Michael's Bath*, Dougl. 632.

(4) Co. Litt. 351. a.

(7) Ibid.

(9) *R. v. Dorstone*, 1 East, 296.

an equal title to acquire a settlement by means of the estate. And it seems to be clear that all the persons, who have a joint or common title, may at one and the same time obtain a settlement in virtue of that title.

Of equitable estates.

With regard to an equitable title, it has been long settled that such title is sufficient to give a settlement. (1) And the test, by which all cases, wherein an equitable interest is claimed, are to be decided, is this: whether the estate on which the party resides is substantially his property. (2) "It must be clearly an equitable interest, and not merely such a claim as might possibly induce a court of equity to interpose in some way or other." (3)

The interest must be clear equitable interest.

Whoever has a substantial beneficial interest, may gain a settlement by means of it.

"Where there is a conveyance to uses not executed, or on trusts stated on the face of the deed, the one party has the equitable, and the other the legal estate. And in these cases, for collateral purposes, a court of common law will take notice of such an equitable estate." (4) Such an equitable estate is a substantial interest, and therefore the *cestui que trust* gains a settlement by residing upon the estate. (5)

Instances of equitable estates. *Cestui que trust.*

If an estate be devised to trustees, in trust to pay all the rents thereof, except 40 shillings, to a fit person to be appointed as schoolmaster, the schoolmaster for the time being is, to the extent of all the rent beyond 40 shillings a year, *cestui que trust* of the estate. (6)

Sole next of kin before administration.

If A. is sole next of kin to a person deceased, that is, if he has exclusive right to take out administration, he has, before administration taken out, an equitable interest in any term of years, which was the property of the deceased. He may, therefore, gain a settlement in virtue of that term. (7)

A party, conveying to trustees to pay a stated sum of money, and afterwards to reconvey.

A. assigns to trustees, to raise by sale or mortgage of the premises, and by the receipt of the rents and profits thereof, a stated sum of money; and after payment of that sum, in trust to reconvey the premises. This conveyance is but a security for the sum mentioned. The estate remains substantially the property of A., and it is a sufficient estate to give him a settlement. (8)

A party, to whom the money arising from the sale of an estate by trustees is to

Suppose, next, a devise of an estate to trustees to sell and pay the money over to A. A. lives upon the estate until it is sold. Here, as in the last case, he is the person beneficially interested in the estate, and therefore may gain a settlement by means of it. (9)

(1) By Lord Kenyon in *R. v. Catherington*, 3 T. R. 772.

(2) See what is said by Lord Mansfield, in *R. v. St. Michael's Bath*, Doug. 632.

(3) By Lord Ellenborough in *R. v. Horndon-on-the-Hill*, 4 M. and S. 565.

(4) By Holroyd J. in *R. v. Toddington*, 1 B. and A. 564.

(5) *R. v. Offchurch*, 3 T. R. 114. And in that case the estate was the equitable estate of the wife; *R. v. Holm East Waver Quarter*, 16 East, 127.

(6) *R. v. Owersby-le-Moor*, 15 East, 356. (7) *R. v. Horsley*, 8 East, 405.

(8) *R. v. Edington*, 1 East, 288.

(9) *R. v. Natland*, Burr. a. c. 793.

Suppose, in the last place, a devise of a house to a party, with a provision that it is the will of the devisor that A. should have free power and liberty during his life to dwell in it. This devise gives A. a beneficial interest in the premises sufficient to confer a settlement. (1)

In all the examples just given, there is a clear beneficial interest, a clear equitable estate, and "not merely such a claim as might possibly induce a court of equity to interpose in some way or other." I shall now mention some instances of persons living upon estates, without having an interest amounting to a clear equitable interest.

In the first place, then, suppose the lord of a manor grants a license to a party to build a house on the waste. Now, the party building the house and living in it does not acquire any interest in the land or building, because, said the Court of King's Bench, a license to occupy does not operate as a grant, nor confer any legal title; and as to equitable right or title, the observations made by Lord Ellenborough are unanswerable, "We cannot take into our consideration what it may be conjectured a court of Equity would determine in this case. Perhaps a court of equity might interfere. But can we say with certainty that it would? We ought to see that the party has a clear equitable interest, and not merely such a title as might possibly induce a court of equity to interpose in some way or other." (2)

Suppose that a son builds a house upon his own land, and agrees by parol with his father that he shall have the house for his life. This, as in the last instance, is only a license to occupy. Nor will it alter the case if the father advances a sum of money which is part of the purchase-money of the land, on condition of having the house built for him. This, I say, will not alter the case, if the legal estate in the land is conveyed to the son. (3)

Upon the same ground, which should always be borne in mind, namely, that a questionable right to go into a court of equity is not sufficient to confer a settlement, upon the same ground, I say, if a parol agreement is made for the purchase of an estate by A., who, upon paying part of the purchase-money is let into possession, and then fails to pay the residue, he has no equitable interest. Nor would a court of equity allow his claim without his paying or offering to pay the remainder of the purchase-money. (4)

be paid, and who lives upon the estate until sold.

A party, who by the devisor's will is to have power to reside on the estate during his life; have all clear equitable estates.

Of an interest which does not amount to an equitable estate.

A license to occupy,

although it amount to a questionable claim in a court of equity,

and though granted to one who advances part of the purchase-money, does not confer any estate.

Neither a parol agreement, accompanied by payment of part of the purchase-money;

(1) *R. v. Woburn*, Burr. s. c. 785.

(2) *R. v. Hagworthingham* 1 B. and C. 634; *R. v. Horndon-on-the-Hill*, 4 M. and S. 562.

(3) *R. v. Standon*, 2 M. and S. 461.

(4) *R. v. Long Bennington*, cited by Bayley J. in 2 B. and C. 132.

nor even, an agreement, according to the statute of frauds, with a like payment, gives the party an equitable estate.

This doctrine, (that a purchaser, who has contracted according to the statute of frauds, has no equitable estate) seems to be at variance with decided cases in chancery, where he has been always deemed to have, from the time of making the agreement, an estate which he may sell, devise, &c.

And this seems to be substantially an estate, and not a mere right.

And this principle has been supposed to furnish an authority for the following decision. The parties entered into an agreement for the sale of an estate, according to the statute of frauds, and, part of the purchase-money being paid, the vendee was let into possession, but the contract was afterwards rescinded; it was decided that the vendee had not in this case, during the time of his occupation, any equitable estate in the premises. (1)

The propriety of this decision has been questioned upon reasons which are apparently solid, and upon authorities which seem to be directly in point. (2) There are cases in equity which expressly recognize the right of a purchaser of an estate, which has been contracted for according to the statute of frauds, to treat that estate as in all respects his own from the time of making the agreement. (3) Such an estate is vendible as his—chargeable as his—capable of being incumbered as his—may be assets, and would descend to his heir. (4) One case, indeed, bears so directly upon the question that it deserves to be stated more at length. In *Atcherley v. Vernon* (5) the question was, whether lands contracted for, and for executing the conveyance of which the time prescribed in the contract had not arrived, passed under a devise of lands in the will of a purchaser, in a case where there were lands actually conveyed, and which would satisfy the description in the will. *Only part of the purchase-money had been paid.* It was objected that the testator had no consummate equitable interest in the lands, and therefore could make no disposition. The Court said, that “as to the lands, for which the testator had contracted, the owners thereof continue trustees for the testator until conveyances are executed; this was never made a question in that court: and as to the objection, that what rests in articles was neither land nor money, it was of no manner of weight, and therefore deserved no answer.”

Upon these authorities, it appears clearly that the interest which the party enjoyed in *R. v. Geddington*, (6) would in equity be considered a solid substantial estate, and not a mere shadowy right. And there is great force in the observation, that it would be strange to assert that a person might be seised of a right, might be mortgagee of a right, might be tenant in curtesy of a right; it being clear that

(1) *R. v. Geddington*, 2 B. and C. 129.

(2) See Observations on the case of *R. v. Geddington*, by A. Amos, Esq.

(3) *Green v. Smith*, 1 Atk. 572; *Seton v. Slade*, 7 Ves. 274; Observations, pages 26, 27.

(4) *Paine v. Mellor*, 6 Ves. 349; Observations, page 26.

(5) 9 Mod. 68; Observations, page 27. (6) 2 B. and C. 129.

the above-mentioned interest in the purchaser is susceptible of these modifications. (1)

Returning from this digression, let us next suppose a devise made to trustees, in trust to pay and apply the rents and proceeds of the estate for the benefit of A., who is an uncertificated bankrupt, his wife and children, all or any of them, during the life of A. as the trustees should think proper. Now, as in a devise the intention of a testator is to be regarded, and as it was manifestly the purpose of the testator in this case to abstain from giving A. any vested interest, since any such interest would pass to the assignees; for these reasons, A., as long at least as he continues without a certificate, has not any such interest in the estate as will enure to give him a settlement. (2)

Suppose next an estate devised to trustees in trust to pay, out of the rents and profits thereof, the debts of the testator, and, after payment of all debts, in trust to pay and apply the rents and profits for the benefit of A. for life. If the rents and profits are not sufficient to pay the debts during the life of A., the trustees are not in a condition to empower A. to take anything. In this case the trustees have the whole interest in themselves during the life of A. (3)

Upon the same principle, if A. makes a conveyance of an estate to trustees, in trust to sell and pay mortgages and other debts, and to pay the surplus money, if any, to A., it should seem that the whole interest is conveyed to the trustees, and what A. is to take is, not a reconveyance of the estate, but only the chance of a residue of the purchase-money. And there is much stronger reason why A. should, after the conveyance, have no continuing interest, if the debts are equal to or exceed the value of the estate. (4)

Whatever is true respecting persons who have a sole interest in an equitable estate, is true respecting joint-tenants, parceners, and tenants in common of such estate.

For example, suppose an estate devised to trustees to sell and divide the money equally among the children of the testator: any one of these children, or all of them, may acquire a settlement by residing on the estate before it is sold. (5)

It is no doubt necessary that persons, in whose favour a devise or conveyance is made, should all be actually pos-

In a devise to trustees for the benefit of A., where it is the intention of the devisor that no interest should vest in A., A. cannot gain a settlement.

A devise to trustees, out of the rents &c. to pay debts, and afterwards to pay the rents, &c. to A. for life, if the debts cannot be paid during the life of A., gives no interest to A. A conveyance to trustees to sell and pay mortgages, and to pay the surplus if any, to A., gives no interest to A.

All joint-tenants &c., of equitable estates, may acquire settlements upon them.

A devise to trustees to pay the rents &c.

(1) Observations, pages 28, 29.

(2) *R. v. Darlington*, 5 M. and S. 493.

(3) By Bayley J. in *R. v. Darlington*, 5 M. and S. 497.

(4) See what is said by Lord Mansfield in *R. v. St. Michael's Bath*, Doug. 630. The main point upon which that case was decided was certainly fraud, the party having fraudulently got into possession of the estate. The opinion of Lord Mansfield is therefore extrajudicial, but it seems to have reason and good sense on its side.

(5) *R. v. Natland*, Burr. s. c. 793.

to A. B. and C., gives them all an interest in the estate.

But if it is to A. B. C., all or any of them, as the trustees think fit, and A. receives nothing, he has, it seems, no estate.

If there be several next of kin, none of them have any equitable estate.

A mere right or franchise will not give a settlement. Instances of rights, franchises, &c., which do not give an interest in land.

possessed of some equitable interest; otherwise there will be nothing out of which a settlement can grow. If an estate be in the hands of trustees, in trust to pay the rents and profits thereof to, or for the benefit of A. B. and C.; in this case A. B. and C. are respectively, by the very terms of the devise or conveyance, possessed of such an equitable interest as will enable them to gain a settlement. But if the trustees have the estate in trust to pay the rents and profits to, or for the benefit of A. B. and C., all or any of them, as the trustees shall think proper, and A. receives no part of the rents and profits, he does not appear to have sufficient interest in the estate to obtain a settlement. (1)

The sole next of kin we have seen has an equitable interest in a term of years. But where there are several persons entitled to distribution, the case is different. A sole next of kin may at any time clothe himself with the legal estate. In the other case, no one possesses this right exclusively, nor do they possess it altogether. It is in the breast of the ordinary, and he may grant it to any one of them at his discretion. Therefore, until administration, no one of them has any estate at all. (2)

Having now gone through those cases in which some interest in equity may be claimed by the parties, I shall proceed to state some further instances, though of a different nature, in which, although some advantage may arise from land, or some right in it may belong to the party concerned, he cannot be said to have any interest in it.

He may, for instance, have a mere right or franchise, which falls short of an interest in the land, and which is therefore insufficient to bestow a settlement.

Thus, if A. as freeman of a borough has a right, while resident in the borough, to turn out his cattle, if he has any, in a particular waste; this is a mere personal privilege and no interest in land. (3)

If lands are left to trustees to permit certain persons, vicars of Dale, to take the profits thereof, to employ the same for certain purposes, one of which is the payment of a yearly sum to the charity school of Dale, and the yearly sum is paid by the vicar to the master of the school; the master does not by this acquire any interest in the land. (4)

A specific legacy out of land, does not give the legatee a sufficient interest in the land to gain a settlement. (5)

(1) See what is said by Lord Ellenborough at the conclusion of his argument in *R. v. Darlington*, 5 M. and S. 497.

(2) *R. v. Widworthy*, Burr. s. c. 109; *R. v. North*

Curry, Cald. 137.

(3) *R. v. Warkworth*, 1 M. and S. 473.

(4) *R. v. Melborne*, Burr. s. c. 244.

(5) See in *R. v. Stockley Pomroy*, Burr. s. c. 762, what is said by Lord Mansfield.

And in other cases of mere right or claim relating to land, as for example, a widow's right to dower before assignment, (1) the right which a mortgagor derives from his equity of redemption, (2) the right which the next of kin have to an account from the administrator for the rents and profits of leasehold land, (3) the right which a party, conveying an estate to trustees to be sold, may have to the residue after payment of debts and incumbrances, (4) and the right which a party has who is put out of possession of land; (5) in all these cases the principle is the same, in all of them the same rule of law must prevail.

A widow's quarentine is not a bare right. Magna Charta gives her, for the space of forty days, enjoyment and possession of her husband's mansion-house; and during those forty days she must necessarily be irreinovable. Therefore at the end of the forty days she has acquired a settlement. (6).

A widow's quarentine gives her a settlement.

v. All such estates as I have been treating of, by whatever mode acquired, except by a conveyance for a pecuniary consideration less than 30l., will confer a settlement upon the persons entitled to them.

The estate may be acquired by any mode except by purchase, for less than 30l.

The two general modes, in which estates may be acquired, are, i. The operation of law; ii. The act of parties.

First, as to operation of law. A husband in right of his wife, (7) a guardian in right of his ward, (8) an executor, (9) an administrator, (10) an heir at law, (11) a customary heir, and any other person upon whom an estate may devolve in some particular character, as tenant by elegit, tenant in dower, may all respectively acquire a settlement by reason of such estate.

It may be acquired by operation of law;

Secondly, as to the act of parties. Such, for instance, as a devise, marriage settlement, conveyance in consideration of natural love and affection, (12) mortgage deed, deed of trust, or any conveyance, in short, except for a pecuniary consideration less than 30l.

or by the act of parties.

The restrictions upon settlements, which might be gained by means of purchased estates, were imposed by the statute 9 Geo. 1. c. 7. s. 5., which enacted, that after 25th March,

Of the statute 9 Geo. 1. c. 7.

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- (1) *R. v. Northweald Bassett*, 2 B. and C. 724; *R. v. Painswicke*, Burr. s. c. 783.
 (2) *R. v. Catherington*, 3 T. R. 771. (3) *R. v. Barkswell*, 1 B. and C. 542.
 (4) *R. v. St. Michael's Bath*, Doug. 630. See page 89.
 (5) By Lawrence J., in *R. v. Houghton-le-Spring*, 1 East, 257.
 (6) *R. v. Painswicke*, Burr. s. c. 783.
 (7) *R. v. Offchurch*, 3 T. R. 114; *R. v. Dorstone*, 1 East, 296; *Mursley v. Grandborough*, 1 Stra. 97; *R. v. Ilmington*, 1 Bl. Rep. 598; Burr. s. c. 566.
 (8) *R. v. Oakley*, 10 East, 491.
 (9) *R. v. Stone*, 6 T. R. 295; *R. v. Wilby*, 2 M. and S. 504.
 (10) *R. v. Horeley*, 8 East, 405. (11) *Ashbottle v. Wyley*, 1 Stra. 608.
 (12) *R. v. Marwood*, Burr. s. c. 386; *R. v. Upton*, 3 T. R. 251.

1723, no person should acquire a permanent settlement by virtue of any purchase of any estate or interest, whereof the consideration for such purchase should not amount to 30*l.* *bonâ fide* paid.

It applies only to those purchases in which money is the *sole* consideration.

"The word purchase, used in this statute, is not to be taken in its largest sense, but is confined to cases where a pecuniary consideration is paid." (1) And even, in cases where a pecuniary consideration less than 30*l.* is paid, for instance, 10*l.*; if there be any other consideration, as love and affection, and the estate is worth more than 10*l.*, this is not within the statute, but a settlement may be gained in virtue of an estate so acquired. (2)

Whether a mere voluntary gift, not in consideration of marriage, or of natural love and affection, nor for any other good consideration, be sufficient to take the case out of this statute, is a question of some doubt: (3)

To all such it applies, in whatever way the money is to be paid.

The value of the estate is not to be taken into the account.

Of what the purchase-money is to consist.

With respect to the manner in which the pecuniary consideration is to be paid, whether by a sum in gross, as 10*l.* for instance, or by a yearly quit rent, as, for example, an estate granted by the lord of a manor, in fee, or for lives, at the yearly sum of 2*s.*, or on payment of a small fine under 30*l.*, (4) it is equally a purchase; and it seems, that in the case of any such grant, the value of the estate is not to be taken into the account. (5)

The consideration, in strictness, should consist only of that sum of money which passes from the purchaser to the vendor. It has indeed been held that, in the consideration for a copyhold estate, the fine to the lord, and the fee to the steward, are to be taken into the account. (6) And it has also been determined that the expences of levying a fine, which properly fell upon the vendor, but which were paid by the purchaser, might be considered as forming part of the consideration. (7) But the expences of a surrender, paid by the purchaser to his own attorney, are quite distinct from the purchase-money, and cannot be computed as part of it. (8)

The purchaser may borrow the money.

It is not material in what manner the purchaser procures the money. If he *bonâ fide* pays 30*l.*, he acquires a sufficient estate to confer a settlement, whether he pay the

(1) By Ryder C. J., in *R. v. Marwood*, Burr. s. c. 389.

(2) *R. v. Upton*, 3 T. R. 251.

(3) Something is thrown out upon this subject in *R. v. Warblington*, 1 T. R. 241, in which case Buller J. seems to doubt what the effect of such a gift would be.

(4) *R. v. Warblington*, 1 T. R. 241; *R. v. Hornchurch*, 2 B. and A. 189; *R. v. Martley*, 5 East, 40.

(5) *R. v. Hornchurch*, 2 B. and A. 189.

(6) *St. Paul's Walden v. Kimpton*, 4 Burn, 640. See 1 Man. and R. 471.

(7) *R. v. Scammonden*, 3 T. R. 474.

(8) *R. v. Cottingham*, 1 Man. and R. 469.

money out of his own pocket, or by the assistance of others.

A. purchases an estate for 40*l.* He pays 10*l.* himself; and B., by his desire, pays 30*l.* After the purchase, A. makes a mortgage of the premises to B. Now, this was, in effect, money borrowed of B., to pay for the purchase; but then, it was money *bonâ fide* paid by A., for that which B. paid by his order or desire, was, in law, money paid by himself. (1)

Or part of it may be paid for him by a third person.

Suppose next, that A. purchases for 40*l.* an estate, which has a mortgage subsisting upon it to the amount of 30*l.*; and that A., as before, pays 10*l.* himself; he has then the estate subject to the mortgage. Suppose that he afterwards borrows 30*l.* of B., pays the residue of the purchase-money, and upon the same day, makes a fresh mortgage to B. Now, in this case, too, the whole of the 40*l.* passed through the hands of A. He *bonâ fide* paid it. And it was not a mere transfer of the old mortgage to B., but the whole estate was, though but for a short interval, vested in A., and he then conveyed it to B. (2)

But, if there is, as in the last example, a mortgage of 30*l.* upon the estate, and A. pays only 10*l.*, this is not a purchase for 40*l.*, but only for 10*l.* *bonâ fide* paid. (3)

And suppose, as before, a purchase made by A. for 40*l.*, of which 10*l.* are paid, and the residue is left on mortgage to the vendor. Afterwards A. agrees with B. to sell him the estate in consideration of the sum of 50*l.*, and then B. pays to the original vendor 30*l.*, and receives from him the title-deeds. Some time after this, the estate is conveyed to B., in pursuance of the agreement, and 20*l.*, the balance of the purchase-money, are paid by B. to A. In this case, A. cannot be said to have borrowed the money of B. The payment made by B. to the original vendor and mortgagee, was a payment for his own benefit, and not on behalf of A. This payment, therefore, was not a *bonâ fide* payment by A. to the amount of 30*l.*, and, therefore, the estate could not confer a settlement upon him. (4)

But if that third person pays it on his own account, it is not money paid by the purchaser.

If the sum of 30*l.* be *bonâ fide* paid for the estate, the estate will give a settlement, although, in the conveyance, the consideration is stated to be a smaller sum; because a party may prove other considerations than those expressed in the deed. (5)

If 30*l.* be paid, the estate will give a settlement, though a smaller sum be stated in the conveyance.

(1) R. v. Tedford, Burr. s. c. 57.

(3) R. v. Mattingley, 2 T. R. 12.

(5) R. v. Scammonden, 3 T. R. 474.

(2) R. v. Charley, 6 T. R. 755.

(4) R. v. Olney, 1 M. and S. 387.

The amount of purchase-money paid by the purchaser is the criterion. The value is immaterial.

The foregoing instances clearly shew that the amount of purchase-money paid by the purchaser is the criterion by which the question of settlement is to be decided. The value, therefore, of the estate seems to be immaterial. And certainly, no money laid out upon the estate can make it such an estate as will give a settlement, if less than 30*l.* were the consideration originally paid. (1)

No act or conveyance of the purchaser can give him an immediate settlement, if the estate was bought for less than 30*l.*

There is one observation more to be made respecting an estate purchased for a sum less than 30*l.* It is this: that such an estate cannot, by any act or conveyance of the purchaser, be made to confer an immediate settlement upon such purchaser.

For instance, A. purchases an estate for 20*l.*, and settles the estate upon his wife. He cannot, by such act of his own, gain a settlement in virtue of any new interest which he may thereby create for himself in the premises. (2) If this were permitted, the statute might always be eluded, by going through the form of a conveyance, and taking back a new estate.

But if a woman purchases for less than 30*l.* and then marries, the husband may gain a settlement, and then his settlement is imparted to the wife.

Where, however, a woman has purchased an estate for less than 30*l.*, and then marries, the husband may acquire a settlement in virtue of that estate, and this settlement is reflected back upon the wife, whose settlement depends upon that of her husband. In this case she does not gain an immediate settlement from the estate. And, moreover, it is the act of the law which gives the estate, and the settlement consequent upon it, to the husband. (3)

If the estate is not a purchased estate, a very minute interest, will give a settlement.

VI. The value of the estate is quite immaterial. A very minute interest, in point of amount, is sufficient to confer a settlement. Even a lease for years, or from year to year, at a rent under 10*l.* a year, will give a settlement to any one upon whom it may devolve by act of law; as, for instance, by executors (4) or marriage; (5) or to whom it may be conveyed for a consideration not less than 30*l.*

Of the title of the party.

II. With regard to the second principal question, namely, whether the person, for whom a settlement is claimed, was entitled to such an estate as will confer a settlement; this, I have already said, is a question partly of law, and partly of fact.

It is a question of law, in the first place, whether the per-

(1) *R. v. Dunchurch*, Burr. s. c. 553.

(2) See *R. v. Tarrant Launceston*, 3 East, 226. The point, however, was not decided in that case.

(3) *R. v. Hmington*, Burr. s. c. 566; 1 Bl. Rep. 598.

(4) *R. v. Stone*, 6 T. R. 295; *R. v. Ynyscynhauarn*, 7 B. and C. 233.

(5) *R. v. Ynyscynhauarn*, 7 B. and C. 233; *R. v. Hmington*, Burr. s. c. 566.

son claiming the settlement, was capable of taking or holding the estate. Now, there does not appear to be any person absolutely incapable of taking or holding an estate, so as to gain a settlement by it, unless, perhaps, it be an alien. And indeed, it is by no means clear, than an alien has not, during the time for which he is in possession of an estate, such a title as will suffice to give him a settlement. For, although an alien cannot take lands, except for the benefit of the king, yet, until office found, the interest seems to be in the alien; (1) and, as executor or administrator, (2) he has such an interest in a term of years, as renders him irremovable.

It is a question partly of law, and partly of fact, whether the character under which a party may claim, as, for instance, that of tenant by curtesy, tenant in dower, executor or administrator, does really belong to him.

It is a question of law, whether the conveyance under which he may claim, does really invest him with the title which he supposes it to give him; and it is a question of fact, whether he is the identical person in whom the interest was intended to vest.

In cases where possession is necessary to the completion of a title, as in the case of a mortgagee, it is a question of fact, whether such possession has taken place.

III. Any person having a competent title to such an estate, as will confer a settlement, gains a settlement in the parish where the estate is situated, by residing in that parish forty days.

I guard the rule respecting residence with this qualification, namely, that there must be a competent title; I guard it in this way, because there are some cases in which a party has a title to an estate, but something is wanting to complete that title. Thus, every party, who has a legal right to the possession of an estate, but possession of which is either withheld by a wrong-doer, or suffered to continue in a mortgagor; every person so kept out, and every mortgagee not in possession, has a legal right to the estate. But their title, which would be complete by possession, wants that essential to complete it. (3) It is, therefore, so far defective: and the party so situated, and residing in the parish, does not fail to gain a settlement for want of residing upon the estate, but because he has not perfected his title to the estate.

The residence, therefore, need not, in any case where the

Whether he is capable of taking or holding, is a question of law.

Even an alien, as it seems, may gain a settlement by means of an estate.

The character in which the party claims is a question partly of law, and partly of fact.

Question of law as to the effect of the conveyance, &c.

Question of fact as to identity; and as to possession.

Of residence. If the person has a complete title, he gains a settlement by residing 40 days in the parish.

A party ousted has not a complete title.

No more has a mortgagee, who is not in possession.

The residence need not be

(1) Com. Dig. Alien, C. 2.; and see also C. 4.

(2) Com. Dig. Alien, C. 7.

(3) See what is said by Buller J. in *R. v. Catherington*, 3 T. R. 771.

upon the
estate.

title is complete, be a residence upon the estate itself. Lord Ellenborough does, indeed, in one case, speak of a trustee permitting the *cestui que trust* to occupy the estate, as if he thought that permission necessary to render him irremovable. (1) But, in another case, (2) it seems to have been taken for granted, that residence in the parish at large was a sufficient residence. And Lord Ellenborough himself decided that a sole next of kin, before administration granted, who has, in that character, an equitable interest, and who resided in the parish elsewhere than upon the estate, was in a situation to acquire, and did acquire, a settlement in the parish. (3)

There is no
time within
which the re-
sidence must
be comprised.

With respect to the period of forty days, necessary to complete a settlement in the parish, nearly the same rules prevail as have been laid down under former heads of settlement. It is not necessary that such residence should be for forty days together; and, in order to gain a settlement by estate, there does not appear to be any period of time, within which, as in the case of hiring and service, the residence must be comprised. There is no reason why the days should not be spread over the whole space of time, during which the interest, that gives rise to the claim of settlement, continues to subsist.

CHAP. VII.

Of Settlement by Office.

Origin of a
settlement by
office.

A SETTLEMENT, by virtue of an office, originated in the statute 3 W. and M. c. 11. s. 6., which enacts, that if any person, who shall come to inhabit in any town or parish, shall, for himself, and on his own account, execute any public annual office or charge in the said town or parish during one whole year, he shall be deemed to have a legal settlement in the same, though no such notice be delivered and published, as is by this same statute required.

The person coming to inhabit in any parish, and serving an office there, must, of course, come to inhabit there in the sense which the statute 13 and 14 C. 2. c. 12. affixes to that

(1) *R. v. Holm*, 16 East, 127.

(2) *R. v. Darlington*, 5 M. and S. 493. In this case, the party, by permission of the same trustees, occupied a house in which he had no interest.

(3) *R. v. Horsley*, 8 East, 405.

expression. Now, that statute intends that no person can gain a settlement in any parish, by coming to inhabit there, unless he reside in the parish forty days. This residence, therefore, is required to complete a settlement by office.

A settlement by means of an office may be obtained in the manner pointed out in the following definition :

Any person, who, upon his own account, and not as deputy for another, executes, during one whole year, in the parish in which he lives, any public office, which, at the least, is an annual office, thereby gains a settlement in the parish.

Definition of a settlement by office.

An office must be derived either immediately or mediately from the crown, or be constituted by statute. (1) Whatever employment, therefore, is not derived in some way from the crown, or constituted by Act of Parliament, cannot be an office at all.

An office must be either derived from the crown, or created by statute.

For instance, the master of a workhouse has not such an employment as satisfies any of the terms of the above proposition. It is only an employment arising out of a contract, between which, and an office, there is a very great difference. (2)

The master of a workhouse has no office.

Nor has the master of a charity-school such an employment as is equivalent to an office, for the appointment is of a private nature, not derived from any public source. (3)

Nor the master of a charity-school.

On the other hand, whatever employment is bestowed by the appointment of the lord of a manor, or of a court leet, as, for instance, that of constable, (4) that of tithing-man, (5) that of borsholder, (6) that of ale-taster, (7) that of hayward, (8) that of hog-ringer, (9) that of warden for a borough, (10) every such employment is an office derived mediately from the crown. And the same may be said of the functions of a parish-clerk (11) or sexton. (12) They are derived ultimately from the crown, and answer the definition of the word office, just as the employment of a churchwarden or overseer, or collector of any duties, (13) agrees to that defi-

Offices belonging to a manor, &c. are derived mediately from the crown.

The office of churchwarden, of overseer, &c.

(1) By Lord Ellenborough in *R. v. Mersham*, 7 East, 171.

(2) *R. v. Mersham*, 7 East, 167.

(3) *R. v. Melborne*, Burr. s. c. 247.

(4) *R. v. Winterbourne*, Burr. s. c. 520, 1 Bl. Rep. 452.

(5) *Burlescombe v. Sampford Peverell*, 1 Stra. 544.

(6) See *R. v. Whitchurch*, Burr. s. c. 365; *R. v. Holy Cross, Westgate*, 4 B. and A. 619.

(7) See *R. v. Bow*, 8 T. R. 445.

(8) See *R. v. Whittlesea*, 4 T. R. 808.

(9) *R. v. Whittlesea*, 4 T. R. 807.

(10) *St. Mary v. St. Lawrence*, in Reading, 19 Vin. Abr. 379.

(11) *Gatton v. Milwich*, 2 Salk. 536.

(12) *R. v. Liverpool*, 3 T. R. 118.

(13) See *Bisham v. Cook*, 1 Stra. 411.

are created by statute. nition by force of the statutes, which constitute them respectively.

An office, therefore, to be one which will confer a settlement, must be derived from some public source of power and authority.

The office must have especial relation to the inhabitants of the parish.

In the next place, the office must, in its nature, have some especial relation to the inhabitants of the parish where it is executed; and must be of an inferior nature.

The statute 3 W. and M. c. 11. applies only to inferior offices.

Thus, in the instances which have been given of various offices, (1) it will be perceived that they all bring the person, appointed to the office, in direct contact with the inhabitants of the parish in which he lives, in such a manner as to give them notice of the situation which he fills; which notoriety is the ground upon which the statute 3 W. and M. gives a settlement to a person exercising any public office. Where this connection between the parish and the duties of the office is found wanting, the office, though derived from the king, or created by Act of Parliament, will not confer a settlement. And Lord Kenyon was of opinion, that the statute was intended to apply only to inferior offices, and not to those of any dignity. For which reason it was held, that the curate of a parish could not gain a settlement by virtue of his curacy. (2)

The office need not extend over the whole parish;

In the third place, although the office must have some relation to the parish, it need not extend over the whole of it. Thus, for instance, a tithingman's office, though it be confined to a subdivision of the parish, has still sufficient relation to the parish to entitle him to a settlement therein. (3)

need not be confined to one parish;

Fourthly, the office need not be confined to one parish.

must be exerciseable in that part of the parish where the officer lives.

The warden of a borough, (4) and the constable of a city, (5) such borough and city comprehending several parishes, may gain settlements by virtue of their respective offices. And so may the sexton of a chapel, the yard belonging to which is in two parishes. (6)

Fifthly, the office must, in some measure at least, be executed in that part of the parish where the officer lives. (7) But if any of the duties of the office are exerciseable in that part of the parish where he lives, it is sufficient.

Thus, for instance, A. is clerk to a chapel, which is situated in an extra-parochial place, but he lives in a part of

(1) Page 97.

(3) See *R. v. Fittleworth*, Burr. s. c. 238.

(4) *St. Mary v. St. Lawrence*, in Reading, 19 Vin. Abr. 379.

(5) *R. v. St. Maurice*, in Winchester, Burr. s. c. 27.

(6) *R. v. Liverpool*, 3 T. R. 118.

(7) *R. v. Liverpool*, 3 T. R. 118; *R. v. Amlwch*, 4 B. and C. 757.

(2) *R. v. Wantage*, 2 East, 65.

Dale parish, within which part some of his duties as clerk are to be exercised. He gains a settlement in Dale. (1)

Sixthly, the person appointed to the office must be appointed on his own account, and not as deputy to another.

The person executing the office must do it on his own account, and not as a deputy.

Suppose that A. is presented by the court leet to the office of tithingman. He, by leave of the court, puts B. in his place, and B. is sworn in at the leet. B. cannot gain a settlement by serving this office. (2) For the words of the statute are express. He must serve "for himself, and upon his own account."

Seventhly, the person appointed to the office may serve by deputy, and will gain a settlement by this deputed service.

But being appointed to an office, he may execute it by deputy.

As when A. is chosen and sworn into the office of constable, and hires B. to serve for him. (3)

Eighthly, the person appointed to the office must execute it for a whole year continuously.

The officer must execute the office for a whole year, which must be a year in law,

If the year, a year in law, (4) is not completed, he does not execute the office in the sense of the statute. (5)

Suppose that A. is appointed to an office, and that during the year he is irregularly removed from it, and another person appointed, in which removal and new appointment he acquiesces, and ceases to perform the duties of the office. Here A. does not, in fact, execute the office for a whole year, and he therefore gains no settlement. (6)

And, moreover, it must be executed continuously.

and he must execute it continuously.

Suppose A. executes an office for half a year, and some years afterwards executes the same office for another half year; this is not sufficient to give him a settlement. (7)

Ninthly, no settlement is gained until the end of the year. Therefore, before the end of the year, A., holding an office, may be removed to another parish. (8)

No settlement is gained till the end of the year.

Tenthly, as to residence, it seems to be necessary that the officer should sleep forty nights in the parish, in order to gain a settlement there. (9)

A residence of forty days is necessary.

(1) *R. v. Amlwch*, 4 B. and C. 757.

(2) *R. v. Allcannings*, Burr. s. c. 634.

(3) *R. v. Hope Mansell*, 2 Bott, 166.

(4) See page 8.

(5) *R. v. Bow*, 8 T. R. 445.

(6) *R. v. Holy Cross*, Westgate, 4 B. and A. 619.

(7) *R. v. Cold Ashton*, Burr. s. c. 444.

(8) *R. v. Fittleworth*, Burr. s. c. 238.

(9) See page 97.

CHAP. VIII.

Of Derivative Settlements.

Definition of a derivative settlement.	A DERIVATIVE settlement has been already defined to be a settlement, which a person derives from a settlement previously acquired by another; the two persons having such relation to one another, that, by operation of law, the settlement of the one, who is considered the more worthy, devolves upon the other, who is regarded as dependent upon him. (1)
Derivative settlements are acquired either by marriage or by parentage.	And derivative settlements have been shown to be of two sorts; the one, a settlement which a wife derives from her husband; the other, a settlement which children derive from their parents; the former being termed a settlement by marriage, the latter, a settlement by parentage. (2)
The settlement which belongs to the head of a family devolves upon the subordinate members of the family.	The general rule applicable to all derivative settlements is this: That every subordinate member of a family has the settlement which belongs to the head of that family.
Definition of a family.	The inquiry, therefore, must be; of what, according to law, does a family consist? Who is the head of the family? And who are its subordinate members?
The husband is the head of the family.	A family, considered with a view to settlement law, consists either of a man and his wife; or of a man, his wife, and their legitimate unemancipated children; or, the man being dead, or having no settlement, or his settlement being unknown, then of the wife or widow, and the legitimate unemancipated children of the marriage.
After his death the widow is the head,	So that, if the man is alive, and his settlement can be ascertained, then he is the head of the family, for the purpose of communicating a settlement, as well as for every other purpose.
until she marries again.	If he is dead, then the widow is the head of the family, as long as she continues a widow; and any settlement, which she may acquire in her own right, is communicated to the children.
	When a woman marries again, she becomes by such marriage a subordinate member of a new family; a relation, which is inconsistent with the notion of her being the head of her former family. She cannot, therefore, by such marriage, or by any other means, while the second coverture subsists, communicate any settlement to the children of the first mar-

riage. If she survives the second husband, she then perhaps becomes once more the head of the former family.

If the husband has no settlement, or his settlement is unknown, then the wife is considered the head of the family; and inquiry must be made into the settlement, which belonged to her before marriage.

What has been said of the head of a family, makes it sufficiently clear who are its subordinate members. The wife, when not the head, is so. The legitimate children, until emancipated, are so. And among such children is to be reckoned a posthumous child.

Now, as children are part of their parents' family, until they become emancipated, and as they can derive a settlement from their parents up to the period of emancipation only, it will be necessary to understand accurately by what means emancipation may be effected, and to determine precisely the time at which it takes place.

Emancipation, or the ceasing to be a part or member of the father's or mother's family, may be effected in a variety of ways, all of which may be reduced to the following heads:—

First, it may be by gaining a settlement. (1)

Secondly; by contracting a relation which is inconsistent with the notion of being a subordinate member of the family; or, in other words, a relation which wholly and permanently excludes the parental control.

Thirdly, by living separately from the parents, and independently of them at any time after twenty-one.

I. As to the first mode by which a son or daughter may be emancipated, namely, by means of a settlement, it is sufficient to observe, that, by the policy of the poor laws, the legal abode or domicile of every person is supposed to be in the parish in which he has gained a settlement; that a person can, at one and the same time, have but one domicile; that this domicile, which he has acquired in his own right, supersedes that which he derives from his parents; and that, when he ceases to have that domicile, which he derived from his parents, he ceases to be one of the subordinate members of the family, such only being considered, in contemplation of law, as having their domicile with their parents.

II. Another mode by which a party may be emancipated, is, by contracting a relation which is inconsistent with the notion of being a subordinate member of the father's or

And the wife is *quasi* the head, if the husband's settlement is unknown.

The subordinate members of a family are, 1. The wife, when not the head; 2. Legitimate unemancipated children. Of emancipation.

Of the modes by which it may be effected.

1. By gaining a settlement.

II. By any relation which puts an end to

(1) See *R. v. Offchurch*, 2 T. R. 114; and *R. v. Bleasby*, 3 B. and A. 377.

parental authority;

as by marriage;

whether the party live with the parents, or separate from them;

or by a son enlisting as a soldier, marine, &c.;

but not by enlisting in the militia.

III. By separation, independence, and full age.

Emancipation is not effected,

mother's family; or, in other words, a relation which wholly and permanently excludes the parental control.

Now, a party, by marrying, contracts such a relation. For, by marriage, a son becomes the head, and a daughter becomes a subordinate member, of a new family; both of which situations are inconsistent with that which each of them had previously filled.

As this species of emancipation arises from the nature of the engagement, it can manifestly make no difference whether the son or daughter continue to live with the parents, (1) or be separated from them. (2)

A son contracts such a relation as I am speaking of, who enters into the king's service as a soldier, (3) or as a marine. (4) For, by this engagement, he puts himself under the control of the crown, and ceases to be under the control of his father. If this engagement continues up to the age of twenty-one, he cannot afterwards be re-incorporated in his father's family. By the enlistment of the son, the parental control is *wholly*, by his coming of age, while in that situation, it is *permanently*, excluded.

But if the son enlists only in the militia, he subjects himself to the control and government of others during that portion of the year only, for which the militia is called out, and does not, by this engagement, wholly exclude the parental control. (5)

III. A third mode by which a child may be emancipated, is, by living separately from the parents, and independently of them at any time after twenty-one.

Whether a child removes from his parents' family when he is twenty-one years of age, (6) or remains separate at that age after a previous removal, (7) the effect must be the same, provided that in each case he derive his support from means independent of his parents. By such separation, joined to this state of independence, he becomes at once emancipated. (8)

These are the several modes by which emancipation may be effected.

On the other hand, whatever circumstances fall short of any of these particulars, will prevent such emancipation from taking effect.

(1) R. v. Everton, 1 East. 528.

(2) R. v. Bugden, 2 Burr. s. c. 270.

(3) R. v. Stanwix, 5 T. R. 670.

(4) See R. v. Rotherfield Greys, 1 B. and C. 345.

(5) R. v. Woburn, 8 T. R. 479.

(6) R. v. Roach, 6 T. R. 247.

(7) R. v. Cowhoneyborne, 10 East, 88.

(8) R. v. Hardwick, 5 B. and A. 176.

Thus, if a son, who was bound apprentice to a certificated person, (1) (by serving whom he could of course gain no settlement) or who was bound by a void indenture, (2) returns to his father's house before the age of twenty-one, he is thereby re-incorporated in his father's family. (3)

if the child, when under age, returns home without having gained a settlement,

Or if a son, who has served upon a hiring in an extra-parochial place (by which service he can also gain no settlement) returns to his father in the same way as in the last case, he is in like manner still a member of the father's family. (4)

And the same is true even of a son who has enlisted in the army, and who, being discharged before he is of age, returns in the same way to the parents' roof. For, by his discharge from the service, and his return to his parents' house, the parental authority and control are revived. (5)

or under a discharge from the army, &c.

We have already seen that the mere circumstance of being twenty-one years of age, will not, of itself, work an emancipation; and that, in the case of a person who has acquired no settlement for himself, who is unmarried, and who is not in the situation of a soldier, or in any other character which places him above parental control; in the case of such a person, three circumstances must concur in order to work his emancipation. He must be of age. He must be living separate from his parent's family. He must derive his livelihood from sources independent of that parent.

Or if the child, though of full age,

It is not sufficient to be of age, and to have an independent business of his own. If, under such circumstances, he chooses to reside under a parent's roof, he thereby makes his election to be considered as part of that parent's family. (6)

continue to live at home ;

And in the same way, the absence of any other of the above requisites, namely, full age, separation, and an independent livelihood, will have the effect of preventing an emancipation from taking place.

Thus, for instance, a minor who is wholly separated from his parents, and supports himself, or is supported independently of them, cannot thereby work out his emancipation. (7)

or if the child, though separate, and living independently of the parents, is a minor ; or if the child,

Nor would a son be emancipated, although of full age and in a state of separation from his parent's family, if he were dependent in any degree upon that parent for support.

(1) *R. v. Hardwicke*, 11 East, 578.

(2) *R. v. Edgworth*, 3 T. R. 353.

(3) See what is said by Lord Kenyon in *R. v. Roach*, 6 T. R. 253.

(4) *R. v. Collingbourn Ducis*, 4 T. R. 199.

(5) *R. v. Rotherfield Greys*, 1 B. and C. 345.

(6) *R. v. Sowerby*, 2 East, 276; *R. v. Woburn*, 8 T. R. 479.

(7) *R. v. Witton cum Twambrookes*, 3 T. R. 355; *R. v. Uckfield*, 5 M. and S. 214.

though of full age, and living separate, is supported by his parents.

In this case, it is not every slight assistance from the parent that would prevent his emancipation. The question, I apprehend, would be whether substantially his livelihood was earned or obtained independently of the parent's aid, or whether the parent's contribution was substantially necessary for his support.

Of the time at which emancipation begins.

It is in many cases material to ascertain at what precise point of time an emancipation is completed. Thus where a father, who is a widower, hires himself as a yearly servant; by such hiring he can gain a settlement, if his children were emancipated at the time of the hiring. (1) And where a child is included in a certificate as a member of his parent's family, by emancipation he releases himself from the certificate, since by emancipation he ceases to be a member of the family. (2)

It begins either when a settlement is completed; or when the parental authority is wholly at an end; as at the instant of marriage;

In the case of emancipation by means of a settlement, it is effected at the moment when the settlement is completed. (3)

In the case of emancipation arising from the nature of the engagement, it takes place at that point of time when the parental control is both wholly and permanently excluded.

When this takes place by means of marriage, the instant of the marriage determines the commencement of the emancipation. For by marriage the party belongs to a new family; and, though afterwards a widow or widower, cannot, as it seems, be re-incorporated in the father's family.

or upon the son, who is a soldier, &c., coming of age;

But when a son under age enlists as a soldier, it is uncertain, until he comes of age, whether the parental control will be permanently excluded. For he may be discharged, and after his discharge may be re-incorporated in his father's family. (4) Until he is of age, therefore, the emancipation is in contingency. But if he continues to serve up to that age, he is then absolutely emancipated. And his emancipation, which flows from the nature of the service, in which he was engaged, extends itself over the whole period of his service; and he is, by relation, emancipated from the time of his enlistment. (5) If he returns into his father's family before twenty-one, he is to be regarded as an unemancipated child during the period of his service. For if he were once emancipated, he would be emancipated for ever. (6)

upon which, his emancipation relates back:

or when separation, in-

In the case of emancipation by the separation and independence of an adult child, that commences at the precise

(1) See page 7.

(3) See *R. v. New Forest*, 5 T. R. 478.

(5) This doctrine of relation is laid down by Bayley J. in *R. v. Rotherfield Greys*, 1 B. and C. 347.

(2) *R. v. Morley*, 2 M. and S. 417.

(4) *R. v. Rotherfield Greys*, 1 B. and C. 345.

(6) See in *R. v. Uckfield*, 5 M. and S. 220, what is said by Bayley J.

time when all these circumstances, which constitute this emancipation, are first found to co-exist.

And, in this last case, the child cannot be emancipated by relation back to any time before he was of age. As, for instance, suppose a son, of the age of eighteen, living apart from his parents, and independently of them, and continuing to do so up to the age of twenty-one. At the age of twenty-one he is emancipated; but at the age of eighteen and upwards till twenty-one, his domicile is supposed in law to be with his parents. (1) For, in contemplation of law, the parental authority, though not actually exercised, continues potentially to exist.

And if a son under age contracts the relation of servant or apprentice, such relation is not, like that of a soldier, absolutely inconsistent with the parental control. Supposing the son, therefore, not to have gained a settlement by serving in the capacity of servant or apprentice, but to continue, in that capacity, apart from his father's family up to the age of twenty-one; in either of these cases his emancipation takes place at that age only, and does not relate back to the commencement of the service. For relation is held to apply only to cases in which there is a control paramount to that of the father, and which wholly supersedes it. (2)

By keeping in mind the rules here laid down, we may determine in every case whether the child be, or be not, at any given point of time, a subordinate member of its parent's family.

The terms of the definition being explained, let us now apply it to some particular instances.

Suppose A. to have a known settlement, and to marry B.. B. *instantly* and *ipso facto* by the marriage, acquires the settlement of A. (3)

Suppose there are one or more children, C. D., &c., of this marriage. Each of these children, at the instant of its birth, also acquires the settlement of A. (4)

Suppose A. at any time afterwards to gain a new settlement for himself; this new settlement is immediately imparted to the wife and children. (5)

Upon the death of A. this settlement continues in the widow and children, until she, now become the head of the

dependence, and full age all co-exist: but in this case the emancipation does not relate back.

Nor does it relate back, where the son continues up to the time of his full age, absent from his father's house, in the situation of servant or apprentice. Relation is confined to cases where there is a control paramount to that of the father.

The wife *instantly* acquires the settlement of her husband:

and the children that of their father;

or that of their mother when

(1) R. v. Uckfield, 5 M. and S. 214.

(2) R. v. Huggate, 5 B. and A. 525; R. v. Lytchett Matravers, 7 B. and C. 226.

(3) R. v. Pincehorton, 4 Burn, 313; St. Giles's Reading v. Eversly Blackwater, 2 Lord Raym. 1332.

(4) R. v. St. Mathew's Bethnal Green, Burr. s. c. 482.

(5) St. Giles's Reading v. Eversly Blackwater, 1 Stra. 580; 2 Lord Raym. 1332.

she is head of the family.

And it is the same with a posthumous child.

The settlement of the children is not changed by the widow's re-marriage.

If the husband has no settlement, or his settlement is unknown, the children follow the maiden settlement of their mother.

But in the case of an Irishman or Scotchman having no settlement, the wife and children are to be removed with the husband to Ireland or Scotland.

If he dies or leaves his family, they must be removed to the wife's place of settlement.

family, acquires a fresh settlement in her own right; (1) that is, by any means but intermarriage.

If a child be born after the death of A., such posthumous child takes a settlement in the same manner as its brothers and sisters. (2)

If B. the widow marries again, the settlement of A., or the settlement which she has acquired since the death of A., continues in the children alone; with whom it remains until they severally acquire fresh settlements for themselves.

Suppose A. to have no settlement, (3) or that his settlement is unknown. (4) In either of these cases the maiden settlement of B. the wife devolves upon her children. (5) And this settlement must, if they continue members of the family, abide with them during the coverture, since B. cannot during the coverture acquire any settlement for herself.

It is perhaps scarcely to be considered as an exception to this last rule, that in the case of a Scotchman or Irishman, who may have no settlement in this country, and whose wife may have had a maiden settlement here, such maiden settlement is not to devolve upon the children so long as the husband is residing with his family. (6) It is, I say, scarcely to be considered as an exception. For the statute, (7) which directs the removal of such a family to Ireland or Scotland, does, as it were, constitute Ireland or Scotland the place of his legal settlement. And then all the consequences of his having a settlement there are made to attach, so long at least as he continues to live with his family. If he dies, or quits his family, and after his death, or while he is absent, they become chargeable, the removal must be to the place of the wife's maiden settlement. (8) By the above-mentioned statute, his family can be removed to Scotland or Ireland only when he is removed there himself.

(1) *St. George's v. St. Catherine's*, 4 Burn, 289.

(2) *Reg. v. Clifton*, 4 Burn, 288.

(3) *R. v. St. Paul's Shadwell*, 4 Burn, 289; *St. Giles's v. St. Margaret's*, Westminster, 4 Burn, 289; *St. Botolph's without Bishopsgate v. St. John's Wapping*, Burr. s. c. 367.

(4) *Westerham v. Chiddingstone*, 4 Burn, 289.

(5) *R. v. St. Mathew's Bethnal Green*, Burr. s. c. 482.

(6) *R. v. Leeds*, 4 B. and A. 498.

(7) Stat. 59 Geo. 3. c. 12. s. 33.

(8) *R. v. Cottingham*, 1 Mann. and R. 439.

CHAP. IX.

Of Settlement by Birth.

A SETTLEMENT by birth, as it now stands, seems to be founded upon the statute 13 and 14 C. 2. c. 12. Foundation of a settlement by birth.

Before that statute, there were laws passed from time to time with a view to fix the places in which poor persons should be maintained. First, there was a statute, which directed that the poor should repair, in order to be maintained, to the places where they were born. (1) There was, next, a later act, which ordered them to repair to the place where they last dwelt, or were best known, or were born. (2) And still later statutes enacted, that they should be sent to the places where they had inhabited for a specified time, or where they were born. (3)

But the stat. 13 and 14 C. 2. more particularly fixed a settlement of this kind, by directing justices to remove any poor person, of the description pointed out in the act, to the parish where he was last legally settled either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least.

Now if this statute regulates, as it appears to do, the acquiring of a settlement by birth, in the same way that it regulates other settlements which the party may gain in his own right, it follows that a residence of forty days is as necessary to the completion of a birth settlement, as it is to that of any other settlements, falling within the view of this act. (4)

The subsequent statute of James 2., (5) respecting notice, cannot, from the nature of the case, have any application to a settlement by birth. This species of settlement therefore rests wholly upon the statute of Charles.

Those who acquire a settlement by birth are,

First, bastards in all cases, unless where particular statutes have introduced exceptions, or where a child has been, in estimation of law, wrongfully born in any particular parish :

Secondly, legitimate children, whose parents have no settlement, or whose parental settlement is unknown.

I. Of bastards. The general rule is, that a bastard gains a settlement in the place of its birth.

The exceptions to this rule may be thus classed.

Of the persons who acquire a settlement by birth.

Of bastards. A bastard is settled in the place of its birth ;

(1) Stat. 12. R. 2. c. 7.

(2) Stat. 11. H. 7. c. 2.

(3) Stat. 19. H. 7. c. 12; stat. 1. Ed. 6. c. 3; stat. 1. J. 1. c. 7.

(4) See however, 1 No. 288, note (1). (5) See page 64.

unless the mother was brought into the parish by fraud, or by a wrongful removal; or continued in the parish after a rightful removal; or was in *transitu* under an order of removal; or was in a state of vagrancy, or in prison, or in a lying-in hospital &c.;

or was living in the parish as a member of a friendly society.

But if she was there under a certificate, her bastard is settled in the parish.

Bastards are not to be removed from the mother

i. When the mother is fraudulently persuaded to leave her settlement or place of abode; (1) or is removed to another parish by a wrongful order even without any fraud. (2)

ii. As a wrongful removal of the mother is not permitted to take effect in altering the settlement of the bastard; so a rightful one, which from necessity cannot be acted upon, (3) or where the removal is suspended during sickness, (4) or where the birth of the bastard takes place *in transitu* during the execution of the order, (5) is considered as carried into effect; and therefore the settlement of the bastard is in that parish to which the mother is rightfully removed.

iii. Where a bastard child is born of a woman in a state of vagrancy, (6) or in the house of correction, (7) or in the county gaol, (8) or in a lying-in hospital, (9) or in the house of industry of any hundred or other district incorporated by act of parliament, for the relief and employment of the poor; (10) in all which cases the bastard child shall be deemed to belong to the parish where the mother was last legally settled.

iv. A fourth exception is by the statute for encouraging friendly societies, (11) in the case of a woman who at the time of the birth of her bastard child is a member of a friendly society, and is residing in any parish not her own, under the authority of that act. Such child shall have the same settlement which the mother had at the birth of the child.

The above rule, that a bastard child is settled in the place of his birth, holds where the mother is residing under a certificate. For he is not such an issue as will follow the settlement of his father or mother; neither is such bastard his or her child within the intention of the statute, (12) so as to be sent back with the parent; (13) nor can bastards be included in the term *family*, for they are *filii nullius*. (14)

Although bastards are settled in the place where they are born, they are not to be removed from the mother during the age of nurture, that is, until the age of seven years; (15) but

(1) *Masters v. Child*, 3 Salk. 66; *Tewksbury v. Twining*, Bulet. 349.

(2) *Westbury v. Coston*, 1 Salk. 121; 2 Salk. 532.

(3) *R. v. Ickleford*, 2 Bott. 4.

(4) Stat. 35 Geo. 3. c. 101. s. 6.

(5) *Reg v. Jane Grey*, 2 Bott. 4.

(6) Stat. 17 Geo. 2. c. 5. s. 25.

(7) Stat. 54 Geo. 3. c. 170. s. 2; *Suckley v. Whitborn*, 2 Bulst. 358.

(8) Stat. 54 Geo. 3. c. 170. s. 6.

(9) Stat. 13 Geo. 3. c. 32. s. 5.

(10) Stat. 20 Geo. 3. c. 36.

(11) Stat. 33 Geo. 3. c. 54.; and see *R. v. Idle*, 2 B. and A. 149.

(12) Stat. 8 and 9 W. 3. c. 30.

(13) *New Windsor v. White Waltham*, 1 Stra. 186.

(14) *Hilton v. Lidlinch*, 2 Stra. 1186.

(15) *Cripplegate v. St. Saviour's* 2 Bott. 13; *Skiffith v. Walford*, 2 Bott. 4.

the parish, where the settlement of the nurture child is, shall maintain it. (1)

II. Of legitimate children, whose parents have no settlement, or whose parental settlement is unknown.

These are settled in the parish where they were born. The child, for instance, born in England, of foreign parents, who have gained no settlement, is, by the circumstance of its birth in this country, entitled to a settlement here.

In the case of a child born of Irish or Scotch parents, the case is somewhat different. For by stat. 59 Geo. 3. c. 12. s. 33., natives of Ireland or Scotland, and their *families* may be removed to their own country. And in this case a child, though born in England, is to be regarded as a member of the family which is to be removed. (2)

If indeed the Scotch or Irish parents be both dead, or if the father be dead, and the mother be married again; in either of these cases, the family being as it were dissolved, there being at least no head to it, and *natives* of Scotland or Ireland being the only persons who, *with* their families, are to be removed, any child of such Scotch or Irish parents will have its settlement in the English parish where it was born. (3) And if a daughter, born in England, of Scotch or Irish parents, becomes chargeable as being pregnant, she may be removed to the place of her birth. The parents and family cannot, in this case, be removed to Scotland or Ireland. (4)

In the last place, in order to complete a settlement by birth, it is perhaps necessary, both in the case of a bastard and in that of a legitimate child, that the child should have resided forty days, at some time or other, in the parish where it was born. (5)

until they are seven years old.

Of legitimate children, whose parents have no known settlement, or no settlement at all.

A child, born here of Scotch or Irish parents, may be removed to Scotland or Ireland with its parents.

But if the parents are dead &c., the child cannot be removed thither.

A residence of forty days in the parish seems to be necessary.

(1) *R. v. Hemlingham*, Doug. 9, note (2) and the cases there cited. See Burr. s. c. 372.

(2) See in *R. v. Leeds*, 4 B. and A. 402, what is said by Holroyd J.

(3) *R. v. Great Clacton*, 3 B. and A. 410.

(4) *R. v. Whitehaven*, 5 B. and A. 720.

(5) See page 107



PART II.

EVIDENCE.

CHAPTER I.

On the Proofs of a Settlement by Hiring and Service.

THERE are three points which are to be made out in proof, in order to establish a settlement by hiring and service: I. That the person was hired in the capacity of a servant for the period of a year; II. That he served in that capacity for a year; III. That within the compass of a year he resided for forty days in some one parish or place.

I. With respect to the hiring, it may be either express or implied.

Proof of the contract of hiring, if an express one.

An express hiring may be either by oral contract, or by a contract in writing.

An oral contract may be proved by any one who was present when it was made. It may be proved by the master, or by the servant, or by any third person.

An oral contract, how to be proved.

If the hiring was by a contract in writing, the writing, being the best evidence of the contract, must, if possible, be produced.

Contract in writing, how to be proved:

If produced, and it appears to be above thirty years old, no evidence is necessary to authenticate it, except proof of its coming out of such custody as makes it reasonable to suppose that it is the genuine contract of the parties. (1)

1. When it is 30 years old;

If it is less than thirty years old, then it must be properly authenticated, that is, must be shown to be the act of the parties.

2. When it is less than 30 years old;

Now, for the purpose of authentication, if there is a subscribing witness, that witness must, according to the general rule, if alive and within the process of the superior courts, be called; unless he be incompetent to give evidence from blindness, insanity, infamy of character, or interest

and attested.

(1) Phillipps, Evid. Chap. VIII. s. 1. p. 458. In this section of Mr. Phillipps's book is to be found all that is here laid down respecting written instruments, and the mode of proving them.

acquired since the execution of the instrument, or cannot, after diligent inquiry, be found. (1)

The subscribing witness being called, must prove either that the instrument containing the contract was executed by the parties, or that by some other means they signified their assent to it.

If the subscribing witness is dead, or otherwise disabled from giving evidence, his hand-writing must be proved. And such proof is sufficient authentication of the instrument, which is thereupon presumed to be the genuine contract of the parties.

3. When it is less than 30 years old, and not attested.

If there is no subscribing witness, or the subscribing witness denies all knowledge of the execution, or was interested, or incompetent from infamy at the time, or put his name to the instrument without the knowledge or consent of the parties, or if after diligent inquiry nothing can be heard of him, so that he can neither be produced himself, nor his hand-writing proved; in all these cases the instrument being considered in law as wholly unattested, the execution of the parties, or their adoption of the agreement signified in some other mode, must be duly proved. (2)

The execution of the instrument may be proved by any person acquainted with the hand-writing of the parties. If they did not execute the instrument, their assent to it must be proved by some one who was present when that assent was given; or if given in writing distinct from the agreement, then by the production of that writing.

No stamp is required, unless the hiring be by deed.

An agreement for the hire of a servant, unless it be a deed, requires no stamp. (3). When, therefore, the agreement is authenticated in some one of the modes above stated, its contents are proof of the terms upon which the servant is hired.

The written contract is the only evidence, unless it is altered by a subsequent independent agreement.

The parties having made this writing the depository of the terms upon which they engage, nothing which took place before or at the time when the agreement was reduced to writing, and which was not committed to writing, can be received in evidence to add to, alter, or qualify the written agreement. Any clear, independent, subsequent agreement will have the effect of varying the terms of the former written contract; and evidence is therefore admissible to show any subsequent agreement to this effect. (4)

(1) Phill. Ev. Chap. VIII. s. 1. p. 454, and the authorities there cited.

(2) Phill. Ev. Chap. VIII. s. 1. p. 457.

(3) Stat. 23 Geo. 3. c. 58. sect. 4., and all succeeding Stamp Acts, of which that now in force is stat. 55 Geo. 3. c. 184.

(4) Starkie on Evid. Vol III. p. 1006, note (f).

But if nothing subsequently occur to alter, add to, or annul it, it is then the only evidence of the hiring.

There are only two cases in which it becomes impossible to produce the written agreement; first, when it is in the possession of the opposite party, who refuses to produce it; secondly, in the case of its loss or destruction.

When the instrument is in the possession of the opposite party, notice should be given to that party or his attorney to produce it. This notice to the party or his attorney being first properly proved; that is, if a verbal notice, being proved by the person who gave it, or by some one who was present when it was given; if in writing, then by a duplicate original of the notice; this notice, I say, being duly proved, if the party refuse to produce the instrument, secondary evidence, as will hereafter be explained, may be given of its contents.

Upon proof that the instrument is in the possession of the opposite party who has had notice, and who refuses, to produce it;

The loss or destruction of an instrument may be proved either by direct evidence of the manner in which it was lost or destroyed, or may be presumed upon proof of search having been made in every quarter where it was likely to be found. The persons who have an interest in the instrument, and one or other of whom would therefore, in all probability, have the custody of it, should be called as witnesses, to show that they have either never received it; or that, having searched for it, they cannot find it in the place where it was likely to have been deposited.

or that it is lost or destroyed,

If the persons originally interested in the instrument, or any of them, are dead, their personal representatives should prove a search made, and the non-discovery of the instrument.

If the instrument is proved to be in the possession of the opposite party, who, after notice given, refuses to produce it, no proof of its execution is required. (1) But on its being proved to be lost or destroyed, it must be authenticated in the same manner as if it were produced. (2)

proof of its execution being, in the latter case, first given;

Having then proved that the instrument was the act of those to whom it is ascribed, and that it is no longer possible to produce it, the party who wishes to make use of it in proof may give what is called secondary evidence of its contents; that is, he may give in evidence a copy, if a copy exists; the correctness of which copy must be proved by the person who made it, or who compared it with the original. If no copy exists, he may prove the terms of the agreement by the mouth of a witness.

a copy may be given in evidence; or if no copy exists, oral evidence may be given of its contents.

Whether the engagement, into which the parties entered,

(1) Phillips, Evid. Vol. I. Chap. VIII. s. 1. p. 433.

(2) See page 111.

Of the proofs
of a general
hiring.

amounted to a hiring for a year, must depend upon the terms in which it was couched. It frequently happens in the hiring of servants, that no particular term of service is mentioned. In all such cases, it must be borne in mind that, if there is no fraud, if there is nothing in the situation of the parties to rebut the notion of their standing in the relation of master and servant, (1) if the engagement be not a mere engagement to serve at the will of one or both of the parties, (2) and provided there be nothing in it which shows that it was meant to be for less than a year; then the hiring is to be taken as a hiring for a year.

Instances of
general
hirings.

A. hired B. to serve him in husbandry, and agreed to give him meat, drink, washing, lodging, and clothes when wanted: (3)

A. agreed that B. should come into D.'s place, and D. had been a yearly servant: (4)

Upon B. asking A. whether he wanted a driver, and A. saying that he did want one, B. on his part said he was willing to serve A., and A., on the other hand, told B. to go into the yard and look after the horses: (5)

B. was hired by A. to be a chaise-driver, and to serve him in his stable: (6)

B. being about to quit a place, in which A. supposed her to have lived as a hired servant, was asked by A. whether she would come and live with him, and take care of his child; to which she consented; and he told her after she had been with him a few days that he would find her meat, drink, and clothes: (7)

B. had lived with A. under a hiring for eleven months. At the end of that time, A. told him that he had better *stay on an end* in his place. To which B. consented. (8)

The apprehension of the parties cannot affect the legal sense of their agreement.

Now these were hirings, in each of which the servant came under the control of the master for an indefinite period of time, in point of fact; for the period of a year, in contemplation of law. And the apprehension of the parties as to the meaning of the contract, or their supposition that either the servant could quit the master, or the master dismiss the servant whenever he pleased, cannot alter or qualify the legal effect of their agreement.

Of the proofs of a hiring at will.

It has been already stated, that if the hiring be a mere hiring at the will of one or both of the parties, no settle-

(1) See Part I. p. 7.

(3) *R. v. Wincaunton*, Burr. s. c. 299.

(5) *R. v. Stockbridge*, Burr. s. c. 759.

(7) *R. v. Worfield*, 5 T. R. 506.

(2) See Part I. p. 8.

(4) *R. v. Berwick St. John*, Burr. s. c. 502.

(6) *R. v. Bath Easton*, Burr. s. c. 823.

(8) *R. v. Macclesfield*, 3 T. R. 76.

ment can be gained under it. From the cases which have already occurred, it will sufficiently appear what is to be deemed evidence of such an engagement.

In *R. v. Christ's Parish in York*, (1) B. went to A. for meat and clothes, as long as he had a mind to stop.

Instances of hirings at will.

In *R. v. Trowbridge*, (2) the hiring was for as long a time as the pauper pleased.

In *R. v. Great Bowden*, (3) in which case B. was engaged by A. as his ostler, it was found by the Sessions that the servant could have left at any time he pleased, and that the master might have turned him away at any time. And upon this finding of the Sessions, which the Court of King's Bench considered as a finding which arose out of the contract, it was decided that the hiring was a hiring at will.

A hiring which is in other respects a general or indefinite one, but in which the wages reserved are monthly or weekly wages, is only a monthly (4) or weekly hiring. (5) Where the wages stipulated for are weekly wages, it cannot alter the case by adding, that the servant is to be engaged for as long a time as his master and himself can agree; for this is only what must necessarily be understood, viz. that the hiring is to continue as long as the master and servant agree; that is, from week to week. (6)

A hiring at monthly wages, is a monthly hiring:

A hiring at weekly wages, is a weekly hiring; although the engagement may be for as long a time as the master and servant can agree; or for such wages summer and winter;

Nor is the hiring a general hiring, where B. is hired to serve A. at the wages of 6s. a week, board, lodging and washing, summer and winter. For this stipulation only imports, that the wages shall continue always the same, and not be varied according to the seasons. (7)

And it was also held in the two following cases, in which the hiring was at weekly wages, and a stipulation was added for an increase of wages during the harvest, that such stipulation did not make the hiring other than a weekly hiring: In the first,

B. was hired as a servant in husbandry to serve for the weekly wages of 4s., board, washing, and lodging, except in the harvest month, when his wages were to be increased to 10s. 6d. a week, and then again to be reduced to 4s. At the time of the hiring, nothing was said as to the length of time B. was to continue in the service. (8) In the second,

or for so much a week, with an increase per week in the harvest;

B. was hired at 8s. a week, and two guineas for the har-

or, for so much

(1) 3 B. & C. 459.

(2) Cited by Bayley, J. 3 B. & C. 462, as a case decided in 1816.

(3) 7 B. & C. 249.

(4) *R. v. Clare*, Burr. s. c. 819.

(5) *R. v. Newton Toney*, 2 T. R. 453; *R. v. Pucklechurch*, 5 East, 382.

(6) *R. v. Mitcham*, 12 East, 351.

(7) *R. v. Dodham*, Burr. s. c. 653.

(8) *R. v. Dodderhill*, 3 M. & S. 243.

a week, and
two guineas
for the har-
vest.

vest. (1) It was thought in both cases, that the hiring being by the week, the parties introduced the stipulation respecting the harvest, in contemplation of the probability of that weekly engagement lasting through the harvest. And the Court did not allow that the last case was distinguishable from the first, it not distinctly appearing whether the two guineas were to be paid *de incremento*, or were to cover the whole harvest.

But a hiring
at weekly
wages, to part
at a month's
notice, is a ge-
neral hiring.

The effect of a weekly reservation of wages is destroyed, if there be an agreement for determining the service by a notice which embraces a longer period of time. As, for instance, suppose that B. is hired to A. at weekly wages, and they have liberty to part at a month's notice. (2) This is "not a weekly hiring, because of the month's notice; nor a hiring for a month, for then it would have been determinable only at the completion of each month's service, whereas this might have been determined at the expiration of a month's notice, without regard to whether it expired at the month's end or not." (3) It is therefore a general hiring.

A hiring at
weekly wages,
to part at a
week's notice,
or at monthly
wages and a
month's no-
tice, is not a
general hir-
ing.

If the notice, stipulated for upon a hiring at weekly wages, be a week's notice; (4) or the notice, upon a hiring at monthly wages, be a month's notice; (5) in each of these cases the hiring is a limited hiring, and not a general one.

In order to prove such a specific hiring as will confer a settlement, it is necessary to give in evidence an agreement for a year, subject to all the rules of law which have been formerly stated. (6)

Of the proofs
of a specific
hiring.

Some instances of yearly hirings were given in the first part of this work, in discussing the legal sense of the term year. (7) Those examples shall be briefly recapitulated here, with the addition of a few others, which contain conditions, or which show the effect of other stipulations introduced into the contract.

Instances of
yearly hirings.

A hiring from Whitsuntide to Whitsuntide, even though the interval be less than 365 days, is a good hiring for a year. (8)

A hiring from the day after Michaelmas-day till the Michaelmas following, is a hiring for a complete year. (9)

(1) *R. v. Lambeth*, 4 M. & S. 315.

(2) *R. v. Hampreston*, 5 T. R. 205; *R. v. Great Yarmouth*, 5 M. & S. 114. The case of *R. v. Bradninch*, Burr. s. c. 662, seems to be contrary.

(3) By Holroyd, J., in *R. v. Great Yarmouth*, 5 M. & S. 119.

(4) *R. v. Hanbury*, 2 East, 423.

(5) *R. v. Clare*, Burr. s. c. 819.

(6) Part I. pp. 8—19.

(7) Page 6.

(8) *R. v. Newstead*, Burr. s. c. 669.

(9) *R. v. Syderstone*, 2 Bott. 239.

A hiring three days after Michaelmas, to serve till the Michaelmas following, and an agreement made at the same time, that the servant shall give in three days after the expiration of that time, form together in substance a hiring for an entire year. (1)

But a hiring for 52 weeks is not a good hiring for a year; since a year consists of 365 days, 6 hours, and 49 minutes. (2)

For which reason, an express hiring for 365 days would probably be deemed insufficient.

And a hiring for a space of time, which includes 365 days, is clearly so, when it occurs in leap-year. As, when B. was hired from three days after Old Michaelmas-day till Michaelmas-day in the next year. Now this was a hiring for two days short of a year, although, in consequence of the next year being leap-year, the stipulated period of service actually amounted to 365 days. (3)

If there be any thing in the contract to import that it was intended to be for a year, the reservation of weekly wages or monthly wages will not control it.

Thus, for instance, if B. is hired at 3*s.* a week the year round, it is a good hiring for a year; this expression, "the year round," being good evidence of its being so intended. (4)

But where the term of a year does not seem to be in the contemplation of the parties, the reservation of weekly wages converts the hiring into a weekly hiring.

A. asked B. what wages he should give him. B. asked 20*l.* a year. This A. refused to do, but said he would give 6*s.* a week for the winter, and 9*s.* a week for the summer; which B. agreed to take. Now here the circumstances of the case, A.'s refusal to give yearly wages, and B.'s consent to take weekly wages, clearly negative the supposition that a yearly hiring was intended. (5)

The following are instances of good conditional hirings for a year.

B. is hired to A. for a quarter of a year; and, if they like one another, then to continue for a year. (6)

B. is hired to go into A.'s service a month upon liking, and is to have 5*l.* a year wages. (7)

And all hirings for a year, though containing stipulations for determining the service by notice, are likewise sufficient for the purpose of gaining a settlement. As where B. was

Neither a hiring for 52 weeks; nor, probably, a hiring for 365 days; and certainly not a hiring for a period containing 365 days in leap-year, is a good yearly hiring.

Weekly wages do not control a hiring intended to be for a year. Evidence as to intention.

They do control a hiring, where no such intention appears. Evidence as to intention.

Instances of conditional hirings for a year.

(1) See *R. v. Milwich*, Burr. s. c. 433.

(2) *R. v. Astley*, 4 Burn's J. 355.

(4) *R. v. Birdbroke*, 4 T. R. 245.

(6) *R. v. Lidney*, Burr. s. c. 1. (Part I. p. 13 of this work.)

(7) *R. v. New Windsor*, Burr. s. c. 19. (Part I. p. 13 of this work.)

(3) *R. v. Ackley*, 3 T. R. 250.

(5) *R. v. Warminster*, 6 B. and C. 77.

hired at 3s. a week the year round, and had liberty to quit at a fortnight's notice. (1)

Proof of the contract of hiring, if an implied or constructive one.

Next we are to see in what manner and by what evidence a contract of hiring may be implied.

An implied contract of hiring has already been defined. (2) And it was in the same place stated, that there are three cases in which a contract of some sort may be inferred. (3) I shall treat of them in their order.

1. Where there has been no previous contract ;

And, first, of implied hirings, where there has been no previous contract between the parties. We are to suppose A. and B. standing in the relation of master and servant to one another. We have no direct evidence of a contract; and are therefore left to collect from the circumstances, whether any and what contract has taken place between them. Now the question in the case before us is this : can it be presumed that A. hired B. for a year? and how is this hiring for a year to be ascertained?

As a necessary foundation upon which to raise any such constructive hiring at all, it must appear that B. has either actually or constructively served a year with A. (4) Such service being established as a fact, if it be "of such a nature as that usually performed by hired servants, it is presumptive evidence whereon to found a constructive hiring." (5) And if a hiring is presumed at all, it shall be presumed to be a hiring for a year, unless there be something to repel such a presumption. What shall be deemed sufficient evidence to repel this presumption will be hereafter shown. In the meanwhile, we will suppose that B. was in the service of A. for a whole year, as a servant in husbandry, (6) or as an ostler, (7) or the like. Then I say that the service of A. for a year, in any such capacity, is evidence of a hiring for a year.

Also, if the question be whether the master hired the servant for a year, or only for some very short period, it is very much in favour of the longer period, if it is proved that the master provided the servant with clothes. For it is not likely, though certainly possible, that a master would furnish clothes to a servant, the benefit of whose services he had secured for so limited a portion of time.

2. Where there has been a previous contract,

Secondly, we are to suppose that there has been a previous contract between the parties. And this previous contract I will call the *original* contract, and the contract which we are to imply the *secondary* one.

(1) *R. v. Birdbroke*, 4 T. R. 245. (2) Part I. p. 19. (3) *Ibid.* (4) See below, p. 123.

(5) By Lord Kenyon, in *R. v. Stokesley*, 6 T. R. 757.

(6) *R. v. Lyth*, 5 T. R. 327. (7) *R. v. Holy Trinity in Wareham*, 2 Bott. 352.

And this consideration is three-fold. In the first place, suppose that B. has served a year under a good and valid hiring for a year. At the expiration of that time, if no new contract is made, and the service continues, the old contract is supposed to be renewed; a presumption which the law raises upon such a state of facts.

In the next place, suppose the original contract was an imperfect one, and, though intended by the parties to be for a year, was not available as such from being retrospective, or containing some exception applying to the first year, or, in short, from any circumstance which rendered it informal and defective. Notwithstanding such defect in the original contract, it seems that, at the expiration of the first year, a good hiring for a year may be implied. (1)

In the third place, suppose B. is hired from March to Michaelmas, and continues in that service, without any fresh contract, for two or three years. (2) Now, what are we to infer in this case? That the pauper is hired again from Michaelmas to March? and so on half-yearly? There is nothing in the case to make this conclusion necessary; and therefore we are at liberty to presume, that the second retainer was according to law; that is, that it was a retainer for a year.

I have hitherto considered only the presumptions in favour of a constructive hiring for a year. I will now proceed to state some of those circumstances which tend to show that a hiring for a year cannot be implied.

And, first, suppose that B. is employed by A. out of charity. (3)

If there has been no previous contract between the parties, this must at once negative all idea of a hiring.

If there has been a previous contract between them, then we are to suppose, that evidence is produced to show that A.'s motive for continuing B. in his service was a motive of charity. Many circumstances might show this; as, for instance, B. falls sick during the period of the first contract, and he is a very inefficient servant at the end of it. A., however, out of humanity and compassion, and to save him from going to a poor-house or an hospital, consents to retain him in his family. Also the wages paid him are not the same. Now here the terms upon which B. lives with A. during the second period of his service, are different from

either a valid one for a year,

or an imperfect one for a year;

3. Where there has been one for less than a year.

Of the presumptions against a constructive hiring;

employment out of charity;

(1) R. v. Hales, 5 T. R. 668.

(2) R. v. Long Whatton, 5 T. R. 447.

(3) See what is said by Lord Kenyon, in R. v. Lyth, 5 T. R. 327., of the case of R. v. Pitminster.

those of the first period. We are not, therefore, called upon to consider the original contract as renewed, but are at liberty to put that contract and the service under it entirely out of sight, and to regard the latter agreement as an original independent transaction.

relationship ; Next, suppose that A. and B. are related. If there had been no previous contract between the parties and service under it, it is clear that the relationship between them would afford a presumption against a constructive hiring.

If there had been a previous contract between them and service under it, the conclusion is not so certain. In the case of *R. v. Sow*, 1 B. & A. 178. Bayley J. is made to say, that, "where the parties are not related, it may fairly be presumed, from a continuance in the service, that the terms on which they continue are the same as during the preceding year. But, where the relation of father and child subsists, the ground for that presumption fails." It is not perhaps safe to consider Mr. J. Bayley as laying down, in this place, a general rule which is to govern all cases; and for this reason, that the circumstances of that case did not make it necessary for him so to do. As he himself states, the terms during the second year were not the same as during the first; for after the first year, the pauper does not appear to have received regular wages, and she was expressly hired the first year for the purpose of gaining a settlement in Sow, which purpose was considered at the end of that period as having been accomplished. Upon the whole, it should seem, that in order to determine whether a second contract may be inferred in those cases where the master and servant are nearly related to one another, regard must be had both to the circumstances under which the original contract took place, and to those which accompanied the continuance of the service after the original contract had expired; and that there is no stubborn rule of law which prevents our drawing the inference of a secondary contract being made, where such inference is agreeable to good sense and reason.

wages paid
weekly or
monthly;

In the third place, suppose that B.'s wages are paid weekly or monthly.

A stipulation in the contract to pay weekly or monthly wages determines the hiring, which is in other respects a general one, to be a weekly or monthly hiring. (1) And this presumption in favour of a weekly or monthly hiring acquires still greater force, if B.'s wages under a previous contract

(1) *R. v. Dedham*, Burr. s. c. 653; *R. v. Pucklechurch*, 5 East, 382; *R. v. Clare*, Burr. s. c. 819.

were paid in a different mode, or at more distant intervals of time.

On the other hand, this presumption is destroyed, and the presumption in favour of a yearly hiring must prevail, if it appears that a notice to quit was to be given, embracing a longer period than that at which the wages were to be paid; as, for instance, that, the wages being weekly, a month's notice to quit was to be given on either side. (1)

It must also be remembered, that although the payment of wages by the week or month may warrant us in concluding that the hiring was by the week or the month, yet that, if the wages were paid quarterly or half-yearly, such payment would be no evidence of a quarterly or half-yearly hiring, since we know that upon yearly hirings the wages are very frequently so paid. Wages paid half-yearly or quarterly would, on the contrary, be deemed reasonable evidence of a yearly hiring. Any payment at a smaller *aliquot* part of a year would, as we have seen, lead to a different conclusion.

In the next place, suppose that B., as a workman, is paid working by
the piece; by the piece.

Now, whether the hiring to be implied be an original or a secondary one, cannot in this case at all vary the conclusion. For the question is simply, whether this mode of payment is repugnant to the notion of a hiring for a year. We know that it is not absolutely inconsistent with it. But in all cases the ground-work of the presumption, in favour of a yearly hiring, is that the service must be one in which we find hired servants usually engaged. Now, unless there be some express stipulation, binding a workman, who is paid by the piece, to remain a whole year in such an employ, it seems very doubtful whether the law will impose such an obligation on him; that is, it seems very doubtful whether the law will consider him as a hired servant. Accordingly, in all the cases, where the wages are stated to be paid by the piece, and settlements adjudged to have been obtained, we find that the workmen have been expressly hired for a year. (2) And in a case where the hiring was not for a year, Lord Mansfield says, "This is the case of a workman hired to work by the piece. It is not like any of the cases where there was a hiring for a year. Indeed, hiring in general and indefinitely gives a presumption of a hiring for a year, where the nature of

(1) *R. v. Great Yarmouth*, 5 M. and S. 114; *R. v. Hampreston*, 5 T. R. 205.

(2) *R. v. King's Norton*, 2 Bott, 209; *R. v. Birmingham*, 3 Doug. 333; *R. v. Coltishall*, 5 T. R. 193; *R. v. Martham*, 1 East, 239; *R. v. Shinfield*, 14 East, 541; *R. v. Burbach*, 1 M. and S. 370.

the service and subsequent facts concur to render it probable that it was so meant. But the nature of the present service is quite otherwise." (1)

Custom of the country to hire half-yearly.

In the last place, suppose that the custom of the country is to hire servants half-yearly. (2)

B. lives with A. a full year as a servant, but nothing is known of the time for which he agreed, or that he agreed for any stated time at all. In this case, perhaps, the custom cannot be permitted to prevail against the implication of law, that this, as a general retainer, is a retainer for a year. If, however, in the original hiring the servant was hired for half a year, and the custom, being such as I have supposed, was known to both the contracting parties; and then at the end of that half-year, B. without any fresh contract continues in the service of A.; such continuance might perhaps be deemed to be under half-yearly contracts, and the custom might be taken to be the basis upon which the subsequent agreements were formed. If this be so, the custom is of force, not as over-ruling the general implication of law, but merely as showing the intention and understanding of the parties.

If too, the custom of the country be for servants to go into and leave their places at some particular time, the fact of a servant quitting at that precise time, may throw light upon the hiring which was otherwise a general and indefinite one.

For instance, suppose B. on the 31st. of December hires himself to A. for 8*l*. without specifying any time, and quits the place two days after Christmas in the following year, receiving the whole of the wages; that being the usual time that servants in that part of the country go into and leave their places. Now the fact of B.'s leaving his place at the time here supposed, tends to show that the term of service contemplated by A. and B. in their contract was less than a year, and that the contract had arrived at its termination before a year had expired. This was the construction put by the Court of King's Bench, upon a hiring and service, under the circumstances above supposed. It being however expressly found by the Sessions that there was a hiring for a year, the Court thought themselves bound by that finding. (3)

In the above inquiry respecting the evidence necessary to

(1) *R. v. St. Peter's in Dorchester*, 1 Blac. Rep. 445. In *R. v. Alton*, 2 Bott, 222. indeed, the Court thought a hiring might be implied when the workman was paid by the piece. In that case there had been a previous hiring for a year, and a new contract was afterwards entered into. But it was not necessary to determine the point, for the decision is good without it.

(2) As stated in *R. v. Lowther*, 2 Bott, 238.

(3) *R. v. Tynley*, 4 B. and A. 624.

be produced in order to presume a contract of hiring, I have mentioned some of the cases which most frequently occur in practice. But it must be remembered that these are only instances. Whatever state of facts or circumstances tends to the same conclusion, may with equal probability be laid as a foundation to support the presumption of a yearly hiring. It is for magistrates to determine whether the proofs are, in common sense and common experience, sufficient for that purpose.

II. The second point to be established in proof, is that the servant served for a year.

The service may be either a service in fact, or a service in law.

To prove a service in fact, it must be shown that the servant did not, at any time during the year, absent himself from his post.

To prove a service in law, it seems to be sufficient to show that the servant was in the master's service at the two *termini*, the beginning and the end of his year. For any absence, which took place at an intermediate period, will be presumed to be in some way sanctioned by the master. (1) And it will be for the other side to show that at the time of such absence the contract was dissolved; the only supposition on which the service can be invalidated.

If the servant was not in the actual service of the master at the commencement of the year, then it must be shown that such absence was justified or excused, on some of the grounds formerly stated. (2)

If he was absent for any period of time at the end of the year, then it must be proved that so much of the service was dispensed with. Now, as we have before seen, the service is in law considered as dispensed with, unless the contract of hiring was dissolved. (3) And it therefore becomes necessary to state the proofs by which it may be made to appear that the contract is no longer on foot.

I have before stated (4) the modes by which a contract of hiring may be dissolved. One is, by the consent of the parties. Another, by a justifiable cause of complaint on the part of one of them. A third, by the authority of magistrates. A fourth, by the wrongful act of the servant, in absenting himself up to the expiration of the term.

I. By the consent of both parties. And here we are to see what shall be evidence of such consent on both sides.

Proof of the service for a year. Service *in fact* how to be proved.

Service *in law* how to be proved. Absence in the middle of the service is presumed to be sanctioned.

Absence at the beginning of the year must be justified or excused.

Absence at the end of the year must be shown to be by dispensation.

Of the dissolution of the contract,

1. By consent, and how such

(1) See Part I. p. 24.

(3) Part I. p. 25.

(2) Ibid. p. 23.

(4) Ibid. p. 25.

consent is to be proved, on the part of the master,

And first, as to what shall be evidence of consent on the part of the master. If he tells his servant that he may go where he likes, (1) or that he will not employ him any longer; (2) or if he hires another person into the servant's place; (3) and still more, if he dismisses the servant, (4) turns him out of doors, (5) or the like; (6) by such acts he shows an intention to part with his control over the servant, he does all that on his part can be done to rescind the contract, and to destroy the relation of master and servant; and nothing more is wanting to make this a complete dissolution, but some act of acquiescence or consent on the part of the servant.

Next, suppose that the servant has, by some act originating with himself, declared or evinced a wish to leave the master's service. If the master, in such case, pays the servant his wages, either the wages for the whole year, (7) or so much only as he thinks due; if he hires another person into the place of the servant, and more especially if he is instrumental in enabling the servant to make a contract with another master; (8) he does, in these several instances, that which releases the servant from his liability, and exempts him from further control.

and on the part of the servant.

Secondly, as to what shall be evidence of such consent on the part of the servant.

A wrongful absence on the part of the servant seems without doubt to have this effect. It gives the master the option of continuing or dissolving the contract. If he takes the servant back again without making a new agreement, he thereby, as we have already seen, purges the absence and continues the contract. If, on the other hand, he refuses to take the servant back again, and proceeds to discharge him, such refusal and dismissal are all that is wanting to a complete annihilation of the contract. (9) Or if the master, upon taking him back, makes a new agreement, this is the necessary inference, that he refused to receive the servant under the former agreement, that he chose to consider that contract as at an end, and elected to dissolve it, as he had clearly a right to do.

(1) *R. v. Bray*, 3 M. and S. 20.

(2) *R. v. Seagrave*, 2 Bott, 321.

(3) *R. v. Thistleton*, 6 T. R. 185; *R. v. Rushall*, 7 East, 471; and see *R. v. St. Peter's Mancroft*, 8 T. R. 477, and *R. v. Mildenhall*, 12 East, 482.

(4) *R. v. Clayhydon*, 4 T. R. 100; *R. v. Gresham*, 1 T. R. 101; and *R. v. King's Pyon*, 4 East, 351.

(5) *R. v. Grantham*, 3 T. R. 754.

(6) *R. v. Leigh*, 7 East, 539.

(7) *R. v. Castlechurch*, Burr. s. c. 68, in which case it should seem that, but for this circumstance, there was nothing on the part of the master to show more than a permission to be absent the last twelve days.

(8) *R. v. Thistleton*, 6 T. R. 185.

(9) *R. v. Clayhydon*, 4 T. R. 100.

So much for a wrongful absence. As to an absence for an excusable cause, it is clear that such absence *in itself* can be no evidence of an intention to abandon the service. But this intention may be shown by other independent circumstances. As, if before the end of the year the servant enters upon a new service. (1) Or, suppose that the servant, some time before the end of the year, falls ill, and goes to his friends or to an hospital, from whence he sends to his master for his wages and clothes. Now from this act on the part of the servant, it is reasonable to infer that he intended to quit the service; and accordingly it has been so determined. (2) And this inference may be drawn notwithstanding that the whole year's wages have been paid; (3) for the utmost that can be inferred from this payment, is that the master recognised the *right* of the servant to have the benefit of a year's service, which illness prevented him from performing. But does it follow that the servant could not waive this right? And is it not our very hypothesis that he does so? And might not the payment of the whole year's wages be an inducement for him so to do?

II. As to the second mode of dissolving a contract, namely, by a justifiable cause of complaint on the part either of the master or of the servant, I have before shown what amounts to such justifiable cause. It is held to be a question of law; and I have therefore considered in another place (4) the general complexion of those facts, which warrant the decision in point of law, that a justifiable cause has been proved.

III. With regard to a dissolution by the authority of a justice of the peace, such dissolution must be proved by the production of the discharge under his hand and seal, and by proof of his signature.

IV. And as to the last mode of dissolving a contract of hiring, namely, by the wrongful absence of the servant up to the end of the stipulated term of service, the time at which the servant went away, and his continuing away up to the end of the term, together with proof of the reason for his absence, must be shown by the master, or some other person cognizant of the facts.

Having now stated the evidence by which a dissolution of the contract may be proved, I come more immediately to the subject of what is termed a dispensation with the service.

(1) *R. v. Maidstone*, 12 East, 550; *R. v. Mildenhall*, 12 East, 482.

(2) *R. v. Whittlebury*, 6 T. R. 464; *R. v. Castlechurch*, as reported in Burr. s. c. 68. And see *R. v. Sudbrooke*, 4 East, 356.

(3) *R. v. Sudbrooke*, 4 East, 356; *R. v. Castlechurch*, Burr. s. c. 68; *R. v. Godalming*, 2 Bott, 497, Burr. s. c. 69.

(4) Part I. p. 26.

Difficulty of reconciling the cases on dispensation.

Of the principle on which the Court of King's Bench has acted in reviewing the decisions of the Sessions, although mere questions of fact.

There is no part of the law of settlement in which the decided cases are so perplexing, from the niceties into which they have run, as those upon the subject of which we are now treating. To reconcile all these decisions, and to state distinctly and satisfactorily the grounds upon which they rest, appears to be a task of insurmountable difficulty. Some of the inconsistencies, which these cases display, might have been accounted for, if the Court of King's Bench, in deciding them, had acted as a Court of Appeal, overthrowing the decisions of the inferior Court in those instances only in which the error was manifest, and leaving scope for them to exercise their own judgment upon the questions of fact which they had before them. But such has not been, until lately, the line of the King's Bench in their decisions. It will be found, upon an examination of all the cases relating to dispensation, that in the majority of them the judgment of the Sessions has been reversed. And the Court seem for a long time to have regarded these appeals as questions submitted to them by the Sessions for the express purpose of having their own decisions reviewed. In *Rex v. Whittlebury*, 6 T. R. 464, Grose J. said, "the question before us is whether there was sufficient evidence of a dissolution of the contract by the consent of both parties. It is a mere question of fact, which I think the Justices should have finally determined; but having sent the case here for our opinion, I have no objection to give mine upon it." In an earlier case, (1) Lord Kenyon had laid it down that, where the Sessions confine themselves to the finding of a fact, the Court would be precluded from inquiring into the grounds of it; but that it is otherwise where it is the very question sent for the decision of the Court. And in *Rex v. S. Field*, 5 T. R. 591, Lord Kenyon makes this observation: "It is said that we are precluded from examining this question by what is supposed to be found as a fact by the Sessions. But it is not so stated here as a fact, that we cannot deliberate upon it, but as a point on which the Sessions desire to have our opinion. I therefore desire that this may not in future be considered as an authority to let in the discussion here of that which the Sessions actually find as a fact; but that it may be remembered that we only proceed upon the wishes of the magistrates below, who desire to have our opinion on grounds on which they entertain doubts. (2) And the Court continued for a long course of years to act upon this rule, even in cases of fact unmixed

(1) *R. v. St. Mary the Less, Durham*, 4 T. R. 477.

(2) See also what is said by Lord Hardwick, in *R. v. Tedford*, *Barr. s. c.* 60.

with law, and notwithstanding its own avowed wishes that the Sessions would find the fact of dispensation or no dispensation, (1) and its own declared opinion that the Sessions ought not to state cases for the purpose of taking the opinion of this Court on facts. (2)

Of late years a different mode of proceeding has been adopted by the Court of King's Bench. But the change has been slow and gradual. In *Rex v. Hardhorn* with Newton, 12 East, 56, Bayley J. said, "It would be much better if the Sessions would decide the fact, whether of the dissolution of the contract, or of the dispensation of the service, and abide by their decision, without sending up a case with the evidence on which they formed their conclusion." In *Rex v. Mildenhall*, 12 East. 482, the Court of King's Bench were of opinion that it was for the Sessions to decide upon the evidence in the case; and they having decided that it was a case of dissolution, the Court could not say that it was a wrong conclusion. In *Rex v. Maidstone*, 12 East, 554, Le Blanc J. said, that upon the facts of the case, the Sessions might have found it to be a dispensation. But he added that he could not say that the Sessions had done wrong, though he thought they might have drawn a different conclusion. And in the course of his judgment he says: "according to the cases it is always a question for the Sessions to decide, whether the consent of the master to the servant's leaving his service a few days before the end of the year for a particular purpose, but paying him his whole year's wages, be a dispensation of the service for the remainder of the year, or a dissolution of the contract." And finally, in *Rex v. Bottesford*, 4 B. and C. 84, Abbott C. J. said, "I perhaps should not have interfered to set aside the decision of the Sessions if they had drawn a different conclusion; but I should not have been so well satisfied with it." And Bayley J. said, "I think this was a point for the decision of the Sessions, and I wish the justices at Sessions would understand that it is their duty to determine questions of fact, and not to send them to this Court for their decision."

A different rule has of late been adopted by the Court.

And it will not now interfere in the determination of questions of fact;

Upon the whole, it seems now to be understood that, on questions of pure fact, the Sessions should decide for themselves; and that if cases of that nature be sent up to the Court of King's Bench, that Court will not act altogether as a Court of Review, but will in all cases, except perhaps those

but will confirm the conclusion drawn by the Sessions, unless

(1) By Lord Kenyon in *R. v. St. Mary, Lambeth*, 5 T. R. 240.

(2) *R. v. Ranton Abbey*, 2 T. R. 209.

it be glaringly wrong.

How far decisions in the King's Bench upon questions of fact are binding as authorities.

The question is sometimes one of fact, mixed with law.

Instance of such a question.

which are glaringly wrong, confirm the conclusion at which by their order the Sessions appear to have arrived.

The only consideration, which now remains to be disposed of, is, whether decisions in the Court of King's Bench upon questions of pure fact are to be regarded as unimpeachable authorities, which must govern and determine all cases where similar circumstances arise. If there be any force in the rule, "*ad questiones facti non respondent iudices*," then all such decisions are entitled to no greater weight than, upon a strict examination by the rules of good sense and the maxims of experience, they may be found intrinsically to deserve. All due respect is to be paid to the opinions of grave and learned judges, and they are to be attended to with the utmost reverence when acting in their proper sphere. But they are not, perhaps, to be followed as authorities in the determination of any questions, which it does not properly lie in their province to decide.

Sometimes it happens that the question is not one of pure fact, but of fact mixed with law. In *Rex v. Corsham*, 2 East, 303, Lord Ellenborough, in answer to what had been urged by counsel in that case as to its being a question of fact, said, "Whether there were a dissolution of the contract or a dispensation of the service, is indeed a question of fact, but of fact mixed with law; and the Sessions, having stated all the circumstances, have sent us the case that we may draw the proper legal conclusion."

In that case the question was of a mixed nature. The circumstances stated by the Sessions were these. A fortnight or three weeks before the end of the year, the servant, in consequence of a dispute with the master, and of being mal-treated by him, went away to his father's house. In the course of the following week, he returned to his master's house, and received the whole of his wages. His master wished him to stay, but he refused, and went back to his father's. Now in this case the Sessions, by finding it to be a dispensation, drew a wrong conclusion in point of law from the facts they had themselves found. For if the servant was maltreated by the master, he had perhaps a right, in law, to demand to be discharged. By refusing to serve out the year he showed his determination to act upon this right. And if he had not in strictness this right, he still clearly showed that it was his intention and his wish not to serve out the remainder of the year. The master on his part acquiesced, and neither laid any claim to the residue of the year's service, nor did any act to show that he still considered him as his servant. Upon the bare statement of the facts

there is clearly a dissolution of the contract, either by the act of one party who had a right to insist upon it, or by the act of both in consenting to it. And the Court of King's Bench did in this case no more than put the true legal construction upon those facts.

The following case is one which involves a question of law in a more evident manner perhaps than that which has been just stated. Sometimes one wholly of law.

About a month before the end of the year, the master went before a justice of peace with a complaint against the servant. The justice, under the stat. 20 Geo. 2. c. 19. s. 2., committed the servant to the house of correction for one calendar month, which did not expire till after the end of the year. The Sessions thought this was not an abiding in the service for a whole year. The Court of King's Bench determined that it was; that the contract was not dissolved; and that the relation of master and servant continued notwithstanding the imprisonment. The object, in sending up this case to the Court, was to ascertain the legal effect of an absence occasioned by an imprisonment under this statute. (1)

Questions of dispensation are exceedingly various in their nature, and in the degree of difficulty which they present. In some of the cases which may arise, there is so clearly a dispensation or leave of absence on the part of the master, that it seems difficult to come to any other conclusion upon them. As for instance, where a servant obtains his master's leave to go and visit his relations on the last day of his service, there being no wish manifested to put an end to the contract. (2) Of the circumstances which prove a dispensation.

To which case may be added all those in which, after the contract is completed between the parties, that is, at a time when no exception can be introduced into the hiring, (3) the master agrees to give the servant leave to visit his relations, (4) or to work elsewhere for a certain time at the end of the year, whether it be with a view to avoid giving him a settlement by the hiring and service; (5) or whether it be without any such view. (6)

Other cases may occur, and have occurred, of greater difficulty. The best rule that can be given for solving them, is to bear in mind what has been laid down upon the subject of dissolution. (7) If the absence of the servant is not

(1) *R. v. Hallow*, 2 B. and C. 739.

(2) *R. v. Bray*, Burr. s. c. 682.

(3) See Part I. page 11.

(4) *R. v. Frome Selwood*, Burr. s. c. 565.

(5) *R. v. Sulgrave*, 2 T. R. 376; *R. v. Market Bosworth*, 2 B. and C. 757.

(6) *R. v. Nether Heyford*, Burr. s. c. 479; *R. v. Goodnestone*, Burr. s. c. 251.

(7) Part I. pages 25-27.

referable to any of the causes there enumerated, then it is only to be accounted for on the notion of the master having dispensed with so much of the service. From the cases upon this subject, it is not easy to extract any certain or satisfactory tests for determining questions of this nature. I have stated those cases at the end of this chapter; and the reader will there see presented in one view the circumstances of each case, the decision of the Sessions, and the affirmance or reversal of that decision by the Court of King's Bench.

Residence for
forty days

III. In the last place, it is necessary to prove that the servant resided for forty days in some one parish or place, such residence being conformable to the rules of law laid down in the Chapter on Hiring and Service.

how to be
proved.

This residence is a dry matter of fact, which may be proved either by the servant himself, or by any one who has personal knowledge of it.

But if such residence took place in a parish to which either the master or the servant came with a certificate, it is then for the party opposing the settlement to prove that the parish was at that time protected by a certificate.

In order to establish the one or the other of these facts, it is necessary, first, to produce the certificate, if possible; and if not possible, then to prove its contents; secondly, whether it be produced or not, to prove its delivery.

Of the mode
of proving a
certificate.

By stat. 3 Geo.
2. c. 29.
nothing need
be proved,
except that the
certificate
comes out of
the proper
custody.

With regard to the certificate itself, provided at least it comes out of the proper custody, and no suspicion attaches to it in this respect; with regard to the certificate, I say, that, by the statute 3 Geo. 2. c. 29., if it be a certificate made according to that act, is to be received in evidence without proof of the particulars which it contains.

Now, a certificate comes out of the proper custody if it be produced by the very parish to which it was originally granted. And, in this case, no further proof of custody can be necessary. (1)

If the parish, for which it was originally intended, is not a party concerned in the question at issue, in this case the certificate should be produced by some one of the officers of that parish, who, being called as a witness, can speak to the fact of its being either kept in the parish chest, or left in the custody of the parish officers.

Delivery of

The delivery of the certificate, which is produced, may be

(1) *R. v. Ryton*, 5 T. R. 259; See Phill. Evid. Vol. I. p. 464; and see *R. v. Netherthong*, 2 M. and S. 337.

either proved by direct evidence of the fact, as by showing that it was by the certificated man put into the hands of some officer of the parish for which it was intended; or it may be inferred, if the certificate is produced by that parish, or is proved to have come out of their custody.

the certificate how to be proved.

As to the time of delivery, since the statute requires a delivery of the certificate at the time when the certificated man goes into the parish, (1) it will be presumed, until the contrary is shown, that it was delivered at that time. If therefore, the fact of delivery being clear, from the certificate being in the possession of the parish for which it was intended, there is any difficulty in proving the date of that delivery, the date of that delivery may be presumed to be contemporaneous with the beginning of the certificated man's residence in the parish. In this case, therefore, it will be sufficient to prove the time when he went into the parish, in order to show the time when the certificate was delivered.

The time of delivery will be presumed to coincide with the time of the person's going into the parish.

If the certificate is not produced, it must be shown to have been in existence, and to have been delivered to the parish for which it was intended.

If the certificate cannot be produced, its existence and delivery must be proved.

Suppose an entry made in the books of that parish stating the receipt of the certificate. Now this entry, being made by persons who had at the time an interest in the subject matter, cannot be evidence either for themselves, or for persons claiming under them. (2) The existence and delivery of the certificate cannot be proved in this manner.

But suppose it is proved that in the parish which is said to have granted the certificate, an order was made for granting such a certificate as the one in question. Suppose it is also proved that the officers of the parish, in which the party is said to have lived under the certificate, declared they would not receive the party unless he procured a certificate from the first parish. These now are circumstances which would warrant the inference that a certificate had been granted and delivered. (3) And these are the circumstances which occurred in *R. v. Debenham*, (4) from which circumstances Abbot C. J. said the Sessions might draw such a conclusion.

And any other state of circumstances, which would satisfy a reasonable mind that a certificate really had existed and had been delivered, would be sufficient to authorize us in coming to the same conclusion.

(1) So held by Lord Kenyon, in *R. v. Wensley*, 5 T. R. 154.

(2) *R. v. Debenham*, 2 B. and A. 185.

(3) 2 B. and A. 185.

(4) *Ibid.*

The certificate though incorrect, or though including the person by mistake, is still conclusive as to the fact of that person residing under it.

The fact being established, that either the master or the servant was residing under a certificate during some part of the forty days, which were to complete the settlement, it is quite immaterial whether the certificate be correct, or whether the party is, by mistake, included in the certificate.

When indeed the certificate is considered as a medium for proving a settlement by force of the admission thus made by the certifying parish, its contents are not, in all cases, and between all parties to be taken as unquestionably true. (1) And if the enactment of the statute had been, that no person, who had a settlement in another parish, should acquire or confer any settlement in the parish in which he was residing; if this had been the rule, then a certificate, except between the two parishes originally concerned in it, would not be final and conclusive evidence of a settlement. But the bare fact of a person residing under a certificate, is quite independent of the question of settlement. The object of the statutes relating to certificates was, that persons should be enabled to remove, under their sanction, from their own parish, and settle elsewhere without being disturbed in their new abode; and at the same time, that the parish into which they went should be protected from the possibility of those persons becoming a burthen to them, unless they became so either by means in which the parish itself concurred, as by being placed in a parish office; or by means of a tenement of the annual value of 10*l.* rented in the parish, which renting was supposed to be sufficient proof that the party was a person of substance; or by means of a freehold estate, which gave the party a permanent interest in the soil of the parish. Now if the certificate were not conclusive for the purpose of showing that a party was residing under the guards and protection of these statutes, their object would be entirely defeated; and persons might acquire and confer upon others settlements by hiring and service and by apprenticeship, without the parish, in which the transactions take place having power in any way to inquire into or interfere with, such proceedings. The mistake too, if any there be, is not the mistake of the certificated parish, and that parish is bound to receive every one who comes into it with a certificate. It seems, therefore, that if a person comes into a parish with a certificate, that certificate, if correct and com-

(1) *R. v. Lubbenham*, 4 T. R. 251.

plete in its formal parts, is a sure and indefeasible protection to the parish, although granted under a mistake to one who does not properly belong to the certifying parish.

Rex v. Goodnestone, Burr. s. c. 251. Three weeks before the end of the year, the servant asked the master's leave to go to the herring fishery. The master consented to his going, if he could get a man to do his work. The servant procured a man to do his work, and paid him for it. He continued upon the herring fishery till after the end of the year. The Sessions thought this a dissolution of the contract. The Court of King's Bench decided that it was a dispensation; and Foster J. said, that as the master had the benefit of the contract during the whole year, so ought the servant to have it also. Cases of dispensation.

Rex v. Frome Selwood, Burr. s. c. 565. The servant, within ten days of the end of the year, told his master he did not wish to be settled in King's Weston, and asked his leave to go and visit his relations; to which the master consented. The Sessions thought it a dispensation, and so did the Court.

Rex v. Bray, Burr. s. c. 682. The day before the year expired, the servant asked leave to go to see his relations before he went to another service. The master gave him leave, deducting one shilling from his wages for that day; told him that if he quitted the service before Michaelmas-day, there might be a dispute about his settlement, and desired him to come back. The servant went away and did not return. This was considered a case of dispensation both by the Sessions and the Court of King's Bench.

Rex v. Potter Heigham, Burr. s. c. 690. The day before the end of the year, the servant desired his master to *discharge* him, saying, that as he had let himself for the next year to a person in a distant place, and was removing further from his friends, he wished to go and pass that day with them, and requested to have that time to himself to spend with them. To this the master consented, and he was accordingly *discharged*, receiving the whole of his wages except sixpence, which he allowed to his master for that day. This was decided by the Sessions to be a dissolution of the contract; by the Court of King's Bench to be a dispensation of the service.

Rex v. Richmond, Burr. s. c. 740. B., the servant, had married one of his master's maids, who was to quit the service thirteen days before B.'s year would expire. The master at that time said to B. that he supposed as his wife was going away, he (B.) would like to do so too. B. answered that he should like it if it was agreeable to the master. The master agreed, and B. in consequence went away at that time, thirteen days before the expiration of the year, receiving his whole year's wages. This was considered a case of dispensation both by the Sessions and the Court of King's Bench. Aston J. thought that the circumstance of the whole year's wages being voluntarily paid by the master, confirmed the master's

acquiescence and approbation. And Ashhurst J. considered the payment of the whole wages as a proof of the master's consent to his absence.

Rex v. St. Philip, Birmingham, 2 T. R. 624. B, the servant, eight days before the expiration of the year, gave the master warning that he would leave the service at the end of the year. The master, on having hired another servant, by reason of some impatient behaviour on the part of B., discharged him, and paid him the full wages, which B. accepted, and quitted the service, declaring however that he would have served the year out if the master would have let him do so. The Court of King's Bench reversed the decision of the Sessions, and adjudged this to be a dispensation; the dismissal being a wrongful act, which was submitted to, but not agreed to by the servant.

Rex v. St. Andrews, Holborn, 2 T. R. 627. Four or five days before the end of the year, the master having become a bankrupt, and a messenger having taken possession of the house, the mistress discharged the servant, paying her the whole year's wages. The Sessions thought this a case of dissolution. But their order was quashed in the King's Bench.

Rex v. Sutton, 5 T. R. 657. The servant, being deprived of his reason, forty days before the end of the year, was taken home by his father, who received the wages for the whole year. The servant continued insane during all those forty days. This was held to be a dissolution by the Sessions, a dispensation in the King's Bench.

Rex v. St. Mary Lambeth, 8 T. R. 236. A., the master, being obliged to leave his house, told his servants that he had no longer any occasion for their services. The circumstances of A. obliged him to take this step, otherwise he would have kept the servant B., and she, on her part, was unwilling to leave the service. She had served a year all but seven days. A. paid her the whole year's wages, and she did not engage in any other service till the end of the year. The Sessions held this to be a dispensation, and their decision was confirmed in the King's Bench.

Rex v. Hardhorn with Newton, 12 East, 51. The servant, three weeks before the end of the year, was wrongfully and forcibly turned out of doors by her master. The next day, she came for her clothes and carried them away, together with the wages which the master insisted were the full wages of the year, she claiming a larger sum. At the time she came for her clothes, she offered to stay to the end of the year, but the master would not let her. This the Sessions very properly adjudged to be a case of dispensation, and the Court of King's Bench agreed with them.

Rex v. Barton upon Irwell, 2 M. and S. 329. The servant, after two months of the year had expired, being then a married man, was taken before a magistrate on the complaint of the master, and committed to the house of correction for one month. When he had been in custody nine days, the master procured his discharge; and he returned immediately, without any new terms being mentioned, and served his master as before. He received no wages for the time he was in custody. This the Sessions considered a case of dissolution. But the Court of King's Bench quashed their order, being of opinion that it would be against the policy of the law, if the servant by his own act of delinquency should have the power of dissolving the contract; that the justices have that power, (by stat. 20 Geo. 2. c. 19.) but had not exercised it; that the master indeed had an

election to avoid the contract, but that he had made his election to continue the pauper in his service, which it was in his power to do.

Rex v. Polesworth, 2 B. and A. 483. The servant, a few days before the end of the year, having asked his master's permission to go to a fair to hire himself, and being refused, went there without his leave. The master, upon his return, said he would employ him no more, and would not pay him his wages. The servant went away from his master's house, and three days afterwards summoned his master before a magistrate. When before the magistrate the servant said he was willing to serve his time out, but the master said he would not take him again. The magistrate then directed the master to pay the servant his whole wages, which he took and was satisfied. He did not hire himself into a fresh service until the year had expired. This was adjudged to be a dispensation both at the Sessions and in the King's Bench.

Rex v. Hallow, 2 B. and C. 739. See this case stated above, page 129.

CHAP. II.

On the Proofs of a Settlement by Apprenticeship.

To establish in evidence a settlement by apprenticeship, it is necessary to prove, *I.* The binding as apprentice; *II.* A residence by the apprentice in some parish or place for forty days, such residence being referable to the apprenticeship.

I. To prove the binding. In order to do this, the deed of apprenticeship must, if possible, be produced.

Whether the deed be or be not produced, the proof of its authentication is the same.

In either case, if it be above thirty years old, and is proved to have been in the proper custody, it proves itself.

In either case, if it be under thirty years old, it must, unless the opposite party keep it back, (1) be authenticated by calling the subscribing witness, if there be one, and he is living, and within the process of the superior courts; unless, indeed, he is incompetent to give evidence from blindness, insanity, infamy of character, or interest acquired since the execution of the deed, or cannot, after diligent enquiry, be found. (2)

The subscribing witness, being called, must prove that the deed was executed by the party or parties, whose execution he witnessed.

If the subscribing witness is dead, or otherwise disabled whose hand-

Binding, how to be proved.

Deed to be produced, if possible, and to be proved (unless it is 30 years old) by the subscribing witness;

(1) See page 113.

(2) See page 111.

writing must be proved, if he cannot be called. from giving evidence, his hand-writing must be proved; and such proof is sufficient evidence of the execution of the deed by those whose execution purports to have been witnessed by him. (1)

If there was no subscribing witness, in fact, or in law, If there is no subscribing witness, or the subscribing witness denies all knowledge of the execution, or was interested or incompetent, from infamy, at the time of execution, or put his name to the instrument without the knowledge or consent of the parties; or if, after diligent inquiry, nothing can be heard of him, so that he can neither be produced himself, nor his hand-writing proved; in all these cases, the deed being considered in law as wholly unattested, the execution of the deed by the party or parties, who ought to have executed it, must be duly proved. (2)

the execution of the deed by the parties must be proved, either by some one who was present, or by proof of their hand-writing.

Now, to prove the execution of the deed, the best evidence is the evidence of some person who was present when the deed was executed. It is not, however, necessary to adduce such proof; but it is, in all cases, sufficient to prove the signature of the parties; and upon that being proved, the delivery of the deed will be presumed.

The deed must be executed either by the party himself, or by his attorney constituted by deed. As to what amounts to legal execution of a deed, it must be borne in mind, that a deed can be executed only in two ways, namely, by a personal delivery from the party, which is the ordinary mode of execution; or, by a delivery on behalf of the party, by one who is *by deed* constituted his attorney for that purpose. (3) And in the latter case it must be also remembered that the attorney cannot sign, execute, or deliver in his own name, but must do so in the name of his principal. (4)

The party, to be bound himself, or to bind others, must execute the deed. No assent, signified by any mode other than by execution of the deed, is a sufficient assent to constitute an apprenticeship. There are particular persons, or persons having particular functions, who are required, as we shall hereafter see, to *bind* either others or themselves. And all these can be bound only by such a due execution of the deed as I have before mentioned. If they do not execute the deed, they cannot in law be said to be *bound* by it. (5)

Upon proof that the deed is in the possession of the opposite party who has had If the deed is not produced, then, in order to let in secondary evidence of its contents, it must be proved either to be in the possession of the opposite party, who have had notice to produce it, (6) or to be lost or destroyed, proper search having been made for it, and all those persons, or their repre-

(1) See page 112.

(2) *Ibid.*

(3) See *Berkeley v. Hardy*, 5 B. and C. 355, and the authorities cited there, 356.

(4) *Combe's case*, 9 Co. 76 b; *Frontin v. Small*, 2 Lord Raym. 1418.

(5) See Part I. page 44.

(6) See page 113.

sentatives being called, who are best able to give an account of it. (1)

When the impossibility of producing the deed is established, and its authentication, if any be necessary, (2) is duly proved, then, it being presumed, until the contrary be shown, that the deed is properly stamped, secondary evidence of its contents may be given.

The best secondary evidence is a counterpart or other copy ; which counterpart or copy must respectively be proved to be correct. For which purpose, some one, who made the counterpart or copy, or who compared either of them with the original, should be called to testify to the fact.

If no copy is in existence, then any witness may be called who is able to give evidence of the contents of the deed.

I have stated generally, that execution by the proper parties must be proved. In order to see who are the proper parties, that is, the parties whose execution is necessary in order to constitute a valid apprenticeship, we must look back to the Chapter on Apprenticeship, and distinguish between bindings by the apprentices themselves, and bindings by the officers of a parish, or by other persons having the like authority.

In the case of an apprentice binding himself, it is material to show his execution of the deed. (3) And this is all that is necessary.

In the case of a parish binding, before the statute 56 Geo. 3. c. 139., there are two points to be established ; first, the execution of the deed by the majority of the churchwardens and overseers ; (4) second, the signature of the two magistrates allowing the apprenticeship, (5) who must also be proved to be such by some person who knew them at the time to be acting in that capacity.

In the case of a binding under stat. 56 Geo. 3. c. 139., that is to say, of a binding since the 1st of October, 1816, there are two suppositions which introduce some difference in the proofs required.

First, suppose the binding of the child to be to some place within the bounds of the county in which he lives. It is then necessary to prove, 1. The signing of two magistrates, accompanied with proof that they were at that time exercising the magisterial functions ; 11. The execution

notice, and who refuses to produce it ; or that it is lost or destroyed ; it being, in the latter case, first properly authenticated, a counterpart or other copy may be given in evidence ;

or if there is none such, oral evidence may be given of its contents. Of the persons whose execution must be proved.

1. In the case of one binding himself.

11. In the case of a parish binding under stat. 5 Eliz.

111. In the case of a binding under statute 56 Geo. 3.

(1) Page 113.

(4) See Part I. page 45.

(2) Page 135.

(5) Part I. page 47.

(3) Part I. page 44.

of the deed by the majority of the churchwardens and overseers, with proof that they acted as such at the time of the binding.

Next, suppose the binding of the child to be in some place not within the limits of the county in which he lives. In this case, besides the proofs of the allowance by two magistrates, and of execution by the churchwardens and overseers, as in the former case, it is also necessary to prove the allowance of two magistrates having jurisdiction over the place into which the child was sent as an apprentice. (1)

iv. In the binding of a boy to the sea-service.

In the case of a binding under the statute 2 and 3 Anne, c. 6., which regulates the binding of poor children to the sea-service, the proofs will vary according to the persons who have bound out any such apprentice. If the binding is by two justices, it must be proved that the two justices *executed* the deed. If, by the head-officer of a corporation, then the execution of the deed by such head-officer must be proved. If by churchwardens and overseers, (2) with the consent of two justices, or with the consent of the head officer of a corporation, then the execution by the churchwardens and overseers, and the allowance of the justices, or of the head-officer, must be shewn in the same manner as in the case of an ordinary parish binding. (3)

v. In the binding of chimney-sweepers.

In the case of a binding under the stat. 28 Geo. 3. c. 48., which enables the churchwardens and overseers of any parish or place, and the overseers of any township or village, with the consent of two justices, to bind out boys, under certain circumstances, as apprentices to chimney-sweepers, the execution of the deed by the parish-officers, or overseers of the township, (4) together with the allowance of the justices, must be proved in the same manner as stated under the former head.

And if the binding is with the consent of the parent of the boy, the consent of the parent must be in some way or other proved.

These are all the proofs necessary to be adduced by the party that wishes to put in evidence the deed of apprenticeship. The contents of the deed will speak for themselves. If there be any thing omitted which ought to have been stated, or any thing stated which vitiates the deed, it will be for the opposite party to take advantage of any such fault or omission.

(1) Part I. page 50.

(3) Part I. page 45.

(2) Must it be the whole, or is a majority sufficient?

(4) The whole, or a majority?

I will state very shortly the objections, at least the principal ones, which render deeds of apprenticeship insufficient for the purpose for which they were intended.

Besides the objection arising from the want of a stamp, or the use of an improper stamp, for the regulations respecting which, I must refer to the Chapter on Apprenticeship; which objection, varying according to the subject-matter, may arise in any of the modes of binding before enumerated: besides, also, any objection from the wording of the instrument, that it does not, in its terms, sufficiently constitute an apprenticeship: (1) besides, objections of this nature, which may occur in every species of binding, there arise, sometimes, in the case of an apprentice binding himself, these which follow:—

Of the objections which invalidate an indenture of apprenticeship. Want of proper stamp. Terms not creating an apprenticeship.

Which two objections apply to all bindings.

First, some part of the premium may have been paid, or some part of the expence of the binding defrayed, out of the funds of a parish. If the party who wishes to impugn the settlement, prove the fact to be so, and the binding took place after the 1st October, 1816, then the binding is an insufficient one, not having been sanctioned by two justices. (2)

Objections in the case of one binding himself.

Next, the full sum of money, or the value of that which in lieu of money is received or contracted for, may not have been inserted in words at full length in the indenture. Upon proof that any money, or any valuable article, which is not mentioned in this way in the indenture, has been received or contracted for, the indenture cannot be admitted in evidence. This is an objection arising upon the Stamp Acts, (3) but it must be remembered, that it does not apply to the indenture of an apprentice placed out by any public charity, such indentures being exempt from all duty upon the premium. (4)

With regard to the binding of parish apprentices, in order to see what objections may be urged to the framing of the indentures, it is necessary to look back to the requisites stated in the Chapter on Apprenticeship, as necessary to be observed in the binding of such apprentices.

I shall follow the same order which I observed in originally treating of bindings of this nature.

And first, with respect to the binding of poor children before the statute 56 Geo. 3. c. 139.

Objections in a binding under stat. 5. Eliz. c. 4.

If it is proved, in the case of a binding by one styling himself chapel-warden of a chapelry, or churchwarden of a township or hamlet; if in this case it is proved that such

(1) See Part I. page 42.

(3) See Part I. page 37.

(2) Part I. page 48.

(4) See Part I. page 39.

person has not been sworn either into the office of churchwarden for the whole parish, or into that of churchwarden, &c., of the township, &c., which forms part of the parish ; (1)

Or, if it is proved that the magistrates, who allow the binding, did not meet together for the purpose ; (2)

Or, that neither of the magistrates is of the quorum ; (3) which fact can only be proved by the production of the commission of the peace, or perhaps by an examined copy of it ;

In any one of these cases, the binding is not valid, and therefore no settlement can be gained under it.

Objections in
a binding un-
der stat. 56.
Geo. 3.

In order to invalidate an indenture made under the statute 56 Geo. 3. c. 139., the party impeaching it must prove,

Either, that the child, at the time of the binding, had not attained the age of nine years ; (4)

Or, that two justices of the county or place, in which the child's parish is situated, have not made the order prescribed by the statute ; (5)

Or, that the parish to which the child belongs, being not more than forty miles from London, the child has been bound to a person out of the county, who lives at a greater distance than forty miles from the child's place of abode ; (6)

Or, that the child's parish being more than forty miles from London, the child was bound out of the county at a greater distance than forty miles, without any such special order as the statute requires ; (7)

Or, that such special order did not state the grounds upon which the justices think fit to allow of a binding at that distance ; (8) and this must be proved by the production of the order itself, if it can be procured ; and if not, then by evidence of its contents ;

Or, that the overseers of the master's parish received no notice of the binding, or did not receive a notice until after the justices had allowed the binding ; (9)

Or, that the indenture was executed by some one of the parties, before the two justices had signed their allowance ; (10)

Or, that the child having been bound to some place where the justices have not jurisdiction, such binding has not been

(1) Part I. page 47.

(3) Part I. page 48.

(5) Part I. pages 49, 51.

(7) Ibid.

(9) This is doubtful, when the binding is in the same county. See Part I. p. 50.

(10) Part I. pages 50, 51.

(2) Part I. page 47.

(4) Part I. pages 49, 51.

(6) Ibid.

(8) Ibid.

also allowed by two justices having jurisdiction in that place ; (1)

Or, that the justice of the county into which the child is bound, and who allows the indenture, is engaged in the same business as the master to whom the child is bound ; (2)

Or, that the justices of the place to which the child is bound, signed the indenture without any notice at all having been given to the overseers of the master's parish, or before such notice was given, or without such notice having been proved or admitted in their presence ; (3)

Or, it must appear upon the indenture that the order made by the two justices for binding the child, is not referred to in the indenture by its date, and the names of the justices. (4)

Upon any of these defects being made to appear, no settlement can be gained under the indenture.

A binding to the sea-service, under the statute 2 and 3 Anne, c. 6. s. 1., will be bad,

Objections in a binding to the sea-service.

If it be proved that the boy, intended to be bound, was not, at the time of the binding, ten years old ; (5)

Or, that he neither begged alms, nor was himself, nor were his parents, chargeable to the parish ; (6)

Or, that the person to whom he was bound, was not a subject of the king, or was not either master or owner of a vessel ; (7)

Or, if the boy's age is not inserted in the indenture. (8)

The binding of a boy to a chimney-sweeper will be bad,

Objections in a binding to a chimney-sweeper.

If it be proved that, at the time of the binding, he was not of the age of eight years ; (9)

Or, that he neither begged for alms, nor was himself, nor were his parents, chargeable to the parish, nor did his parent consent to the binding ; (10)

Or, if his age is not inserted in the indenture. (11)

II. The binding being duly proved by the party which has to make out the settlement, the next point to be established in evidence is this ; that the apprentice resided forty days in some one parish or place under the indentures.

Residence, how to be proved.

To prove the bare fact of passing forty nights in any one place, is the first step ; and the mode of proving it needs no explanation.

It will be proved, if it be shown that the apprentice slept for forty nights in some one parish,

To prove that he resided there under the indentures, or in other words, that his residence was referable to the appren-

(1) Part I. pages 50, 51.

(2) Ibid.

(3) Ibid.

(4) Part I. page 51.

(5) Part I. page 51.

(6) Ibid.

(7) Ibid.

(8) Part I. page 52.

(9) Ibid.

(10) Ibid.

(11) Ibid.

while serving the original master, and if his sleeping there was connected with the service.

Circumstances which show that the residence was not connected with the service, should be brought forward by the opposing party. Which party should also prove a certificate if there was one. If the settlement depends upon a service with a second master, the party proving the settlement must show the consent of the first master.

Which consent may, in certain cases, be either by word of mouth or in writing. Instances of consent by word of mouth.

ticeship, is a simple or a more complicated matter, according to the circumstances of the case.

If he served the original master during those forty days, and his sleeping in the parish was connected with that service, (1) the proof of that fact completes the evidence required to make out a settlement.

But the question frequently arises, whether, in point of fact, the apprentice has been, during the whole time, actually, or even constructively, serving the master. Some instances have been given in the Chapter on Apprenticeship, (2) to shew what would be considered a residence under the indentures. If any of the circumstances there mentioned, as showing that the residence was not referable to the indentures; if any of these circumstances appear in evidence, the settlement is thereby defeated. These, therefore, if they exist, are the facts which it belongs to the party opposing the settlement, to bring into view.

It is also for the party impeaching the settlement, to prove that the master was a toll-collector, if the fact be so; or, that the parish in which the apprentice resided, was, at that time, or during some part of that time, protected by a certificate.

If the apprentice served a second master, then the party supporting the settlement, must shew, that the service with the second master was such a service as the law warrants.

Now, in order to show that the service was such a service as the law warrants, it is, in the case of parish apprentices, before the 1st of October, 1816, and of other apprentices, both before and since, necessary to prove that the first master gave a *particular* consent to the service with the second master. (3)

This consent may be evidenced either by word of mouth, or by some matter in writing. By word of mouth, as where I tell my apprentice that he may go and serve another person, whom I name, instead of myself; (4) or where, upon finding that my apprentice has engaged himself to a second master, I express my approbation of it in such terms, as to show that I approve of his having done so, and that I agree to his continuing in that service; (5) or where, upon another person applying to take my apprentice, I give him a character, for this implies and includes a consent. (6) Any evidence,

(1) See Part I. page 60.

(2) Part I. pages 60—62.

(3) Part I. page 58.

(4) *R. v. Holy Trinity in the Minories*, 3 T. R. 605.

(5) *R. v. Bradstone*, 2 Bott, 434; *R. v. Bradnich*, 2 Bott, 430.

(6) *R. v. St. Mary, Lambeth*, 2 Bott, 431.

in short, direct or presumptive, which satisfies a reasonable mind that a particular consent was given by the first master, is sufficient for the purpose of proving such consent.

When the consent is evidenced by matter in writing, that writing, being duly stamped, (1) must be authenticated in the same manner as other instruments in writing. (2)

If the writing is not stamped, it cannot be received in evidence; and if it cannot be received in evidence, the consent, in that case, cannot be proved at all. (3) If, indeed, there was, *subsequently* to the written document, a consent given by word of mouth exactly to the same effect, the question occurs, how far this can be considered a *clear independent* agreement, such only being allowed to destroy the effect of a prior written agreement; (4) and this is a question which I cannot presume to decide.

In the case of a parish apprentice, who, since the 1st of October, 1816, is assignable only in the particular mode before pointed out, (5) in order to prove, on his part, a legal service with a second master, it is necessary to produce the writing which contains the assignment, if it can be produced, (6) and to authenticate it, by proving the assignment to be the act of the master, and by proving the consent of the two justices who sanction the assignment. (7)

If the assignment cannot be produced, then oral evidence may be given of its contents. (8)

The transfer of the apprentice being proved, it remains to be seen, whether the service with the second master can be considered a continuation of the apprenticeship, to which he was originally bound, and whether the residence, while he is serving the second master, is a residence referable to the indentures.

The rule upon this subject has been stated in the Chapter on Apprenticeship, (9) and some examples and illustrations of the rule were also there given. (10) From what was laid down in that place, we may gather, that any circumstances, which shew the service with the second master to be essentially different from that contemplated by the indentures, are sufficient to prove that the apprenticeship was not continued.

If the second master make a contract with the apprentice, **Objections**

If the consent is by writing, the writing must be stamped and duly proved. If not stamped, it cannot be admitted in evidence.

To show the service of a parish apprentice with a second master, since 1st Oct. 1816, the written assignment must be produced.

If it cannot be produced, parol evidence may be given of its contents.

(1) See Part I. page 58.

(3) *R. v. St. Paul's, Bedford*, 6 T. R. 452.

(5) Part I. page 59.

(7) Part I. page 59.

(9) Part I. page 52.

(2) See page 111.

(4) See page 112.

(6) See page 111.

(8) See page 113.

(10) Part I. pages 52—57.

which may be made to this service with a second master;

by which he hires him at specified wages, for a year, or any other period of time; (1)

Indeed, if the second master make any agreement with the apprentice, which is inconsistent with the indentures;

Or, if the trade of the second master is different from that of the first, and it was the object of the binding that the apprentice should learn the trade of the first master. (2)

In any one of these cases, and in others of a similar nature which may occur, the service is not a continuation of the apprenticeship.

and which it lies with the opposing party to make.

Besides any such facts as I have been just instancing, which it lies perhaps rather with the party opposing the settlement to bring to light, and the mode of proving which is sufficiently obvious, that party may also, in order to disprove a settlement in the parish of the second master, show any circumstance of the nature pointed out in considering the service with the first master. (3)

If the settlement depends upon a service with a third master, &c. the party proving the settlement must also show the consent of the second master, &c.

If the apprentice is in the service of a third master, it is necessary to prove the transfer from the second master, who now stands, in every respect, in the situation of the first. (4)

The continuation of the apprenticeship, and a residence referable to the indentures, must also, in like manner, appear.

If there are other masters to whom the apprentice is transferred, the proofs are at each step the same.

CHAP. III.



On the Proofs of a Settlement by Renting a Tenement.

THE subject of evidence relating to a settlement by renting, naturally divides itself into three parts:

First, must be considered what evidence is required to prove a settlement by renting before the statute 59 Geo. 3. c. 50., that is to say, before the 2d of July, 1819.

Secondly, what evidence is necessary to prove a settlement from that day, until the 22d of June, 1825, or before the statute 6 Geo. 4. c. 57.

Thirdly, what evidence must be adduced to establish a settlement under this latter statute.

(1) *R. v. Whitchurch*, 1 B. and C. 574.
(3) Page 142.

(2) Part I. page 52.
(4) Page 142, &c.

I. To prove a settlement by renting a tenement before the 2d of June, 1819, the following points must be established in evidence: i. That the subject-matter of the renting was a tenement; ii. That the person who took and occupied the tenement, took and occupied in the capacity of tenant; iii. That the yearly value of the tenement, at the time of his coming to settle upon it, was 10*l.*; iv. That he resided for forty days in a parish which contained some part of the tenement.

Of the proofs of a settlement by renting before 2d June, 1819.

i. In order to prove that the subject-matter of the renting is a tenement, it is only necessary to show of what it really consists, by means of some witnesses acquainted with it, or by proof of the deed or agreement, if any, which contains a description of it, and thus to make it appear that it comes within the legal meaning and definition of a tenement. (1)

i. It must be proved that the thing taken was a tenement.

In the case of buildings, a difficulty may sometimes arise upon the question whether they are fixed to the ground or not. If they are not affixed to the land in some way; they do not savour of the realty, and are therefore not to be regarded as tenements. If, for instance, a wind-mill be proved to be merely laid upon brick pillars, without being attached to them, it is no tenement, but a mere chattel. (2)

ii. The next point is to prove a taking and occupying in the character of tenant.

ii. that there was a taking and occupying as tenant;

It is necessary here to bear in mind what was formerly laid down (3) as a qualification of the tenancy; namely, that it must be an original taking in the capacity of tenant; an original taking either as lessee or sub-lessee. It must not appear that the occupier came to the tenement as assignee or purchaser of the term. If he appear to have taken in one or other of these capacities, he may possibly in another way be entitled to a settlement by virtue of such estate; (4) but no settlement can thereby be gained under *this* head of renting a tenement. The assignee or purchaser of a term does not *rent a tenement* in the sense of the statutes relating to this subject.

that is, as lessee or sub-lessee, and not as assignee of the term.

The case then being supposed to be clear of this objection, we are to see by what means a tenancy, or an occupation as tenant, may be proved.

There are three modes by which, in all cases, a tenancy may be proved; to which may be added a fourth, applicable only to those cases in which the person is dead for whom a settlement is claimed. A tenancy may be proved,

Of the modes of proving a tenancy.

(1) See Part I. p. 65.

(2) *R. v. Londonthorpe*, 6 T. R. 377.

(3) Part I. p. 67.

(4) Part I. p. 94.

A tenancy
may be
proved,

First, by means of the contract between the parties, accompanied by proof of occupation ;

Secondly, by proving such occupation, and also payment of rent ;

Thirdly, by establishing the fact of occupation, and by proving who was the landlord or owner of the tenement ;

And, fourthly, where the occupier is dead, by proof of possession on his part, and of declarations made by him, when in possession, to show on what terms he held.

First, by proof
of the contract and of
occupation ;

1. With regard to the first mode of proof, that by means of the contract itself, accompanied by evidence of occupation ; it need only be observed, that, as to the agreement, if it was in writing or under seal, it must be proved according to the rules formerly laid down ; (1) if it was by parol, it may be proved by any one who was present when it was made ; and that, as to the occupation, it may, in like manner, be established by any one cognizant of the fact.

or, secondly,
by proof of
occupation,
and payment
of rent ;

2. Another mode of proving a tenancy, is by establishing, as before, the fact of occupation, and by also showing a payment of rent. Such evidence establishes a *prima facie* tenancy in all cases, even in those where there has been a lease between the parties. (2) With regard to the mode of proving a payment, I shall more particularly state that in another place. (3)

or, thirdly, by
proof of occupation, and by
showing who
was the landlord or owner ;
for it will be
presumed that
the occupier
was in as original lessee,

3. A *prima facie* case is also made out by proving occupation as before, and by simply showing who was the landlord or owner of the thing held. For, suppose that B. is proved to have occupied a tenement, of which A. was landlord or owner, he must, under these circumstances, be taken to be A.'s original tenant, and no presumption will be raised in favour of his being an assignee of a term. For, in order to support such a presumption, it will be necessary to intend three things ; first, that A. made a lease to a third person ; second, that B. came in under that person ; third, that B. came in, not as sub-lessee, but as assignee of the term. Will the law put such a construction or raise such a presumption on B.'s occupation ? Is it not, on the other hand, a more simple and natural inference to draw from such a state of facts, that B. is in possession of the tenement in the character of original tenant to A. ?

and with the
assent of the
landlord or
owner :

It will also be presumed, upon this state of facts, that B., the occupier, was in with the landlord's assent. Otherwise the presumption must be, either that he was a

(1) Pages 111, 135.

(2) R. v. Holy Trinity, Hull, 1 Mann. and R. 444 ; and see Doe v. Samuel, 5 Esp. 173.

(3) Page 152.

trespasser, or that he occupied in some particular character, as in that of bailiff or servant; neither of which cases will in law be presumed without some proof.

4. If the occupier of the tenement is dead, then an additional mode of proving a tenancy is open to the party that seeks to establish the settlement. For, in this case, the fact of a possession on his part being first proved, any declarations which he may have made, when in possession, that tend to show in what manner or on what terms he occupied, may be given in evidence. For when possession is once proved, the presumption being that he was owner of the fee, any declaration which serves to show that he was not seised in fee, is a declaration made against and in diminution of that interest which the law attaches to the possession.

There being, then, a *prima facie* case made out on the part of those who wish to establish the settlement, it may be met on the other side by proof of any circumstances which either directly overthrow it, or render further evidence necessary to support it.

It may be proved, for instance, that the occupation was against the consent of the landlord, or owner;

Or that it was an occupation of premises in the capacity of bailiff or servant to the owner or lessee of the property, an occupation only for the better and more convenient performance of his service; (1)

Or that the enjoyment which he had of the supposed tenement was only a privilege allowed him in respect of something else, which was the principal thing: (2)

By any of which circumstances being made to appear, the title to a settlement is at once destroyed.

Again, it may be proved that no rent was ever in fact paid. This will call upon the first party to show a direct and positive assent of the landlord to the occupier's possession. If that assent is not shown, there are then no facts whatever which directly prove a tenancy, and none from which a tenancy can be inferred.

To prove the assent of the landlord, any circumstance may be adduced which shows that he recognized the occupation, and that he did not treat the occupier as a trespasser.

Again, if it be made to appear that the person, whose settlement is the object of proof, was not the original taker, but that he occupied under one who was the original taker, the question occurs whether any farther proof is necessary

and, fourthly, if the occupier is dead, by proving his occupation, and giving in evidence his declarations as to the terms on which he held.

Of the proofs by which a *prima facie* case of tenancy may be rebutted;

If the party was not the original taker, he must be proved to have

(1) Part I. p. 62.

(2) Part I. p. 63.

been sub-lessee. in order to prove that he occupied as sub-lessee and not as assignee. Now such further proof does appear to be necessary, and for this reason. The first tenant having had, we will suppose, a lease for life or a term of years, there are no better grounds to presume that the second occupier was a sub-lessee, than there are to presume that he was assignee of the lease or term. There being then no ground for leaning to one presumption rather than to the other, (1) and since, as assignee, he could not gain a settlement in this way, it seems necessary for the party maintaining the settlement to prove that state of facts which would entitle the occupier to a settlement; that is, to prove him a sub-lessee.

Now he is sub-lessee, if the first tenant has leased a less interest, or an estate of shorter duration, than his own; if, for instance, having a lease for his own life, he has leased an estate for the life of the sub-lessee, for this interest is, as regards the first tenant, a less interest than an estate for his own life; or if, having a term of seven years, he has let to the second occupier the whole or any part of the tenement for six years.

An under-lease, how proved.

There are three ways of proving an under-lease of this nature; first, by means of the agreement by which the under-lease was granted, whether by deed or other writing, or by word of mouth; which agreement must be proved in the usual manner; (2) secondly, by proof of an occupation by the first tenant, subsequent to an occupation by the second tenant, and before the end of the original term; for this subsequent occupation negatives the idea of an assignment, and is reconcilable only with the supposition of an under-lease; thirdly, by proof of payment of rent to the first tenant by the second; for then the first tenant is landlord to the second.

Of the proof of yearly value.

III. The next step is to prove that the yearly value of the tenement, at the time of the occupier's coming to settle upon it, was 10*l*.

Bearing in mind the time to which such value must refer, namely, the time of coming to settle upon the tenement; (3) which time is, in the case of a tenancy from year to year, at the beginning of every succeeding year. (4) Bearing this in mind, and recollecting that a tenancy by several, either as joint-tenants, or as tenants in common, is a sufficient

(1) If A., the tenant, quits the premises, and upon his quitting, B. takes possession, and no other fact appears, such as payment of rent by B. to A., B. may be presumed to have come in as assignee of A. *Doe v. Murless*, 6 M. and S. 110; *Doe v. Williams*, 6 B. and C. 41. (2) Pages 111, 135. (3) Part I. p. 71. (4) *Ibid*.

tenancy, if the value of each tenant's share is sufficient : (1) recollecting, too, that a person renting a tenement of the proper value does not lose his settlement by letting off part to under tenants : (2) it will then only remain for the party affirming the settlement to give reasonable evidence of the yearly value of the tenement ; which yearly value has before been explained to mean the value of the tenement if let by the year. (3)

In order to prove the value of the tenement, either competent persons may be called to state what, in their opinion, the tenement was at the time worth, if let by the year :

Or, by way of making out a *prima facie* case, the rent may be given in evidence. And if it be a yearly rent, and there be no fraud in the case, it is a very fair criterion of the value.

The value may be proved either by means of competent persons ; or, as a *prima facie* case by means of the rent.

If the tenement was taken for a shorter period than a year, as, for instance, if it was a monthly or weekly taking, then the monthly or weekly rent does not afford such conclusive evidence of the yearly value, although the amount for twelve months, or fifty-two weeks, be, in fact, equal to 10*l*.

Suppose now a tenement let at four shillings a week. This rent, taking the year round, amounts to 10*l*. 8*s*. But it would probably require further evidence to satisfy magistrates that this was the value of the tenement if let by the year.

If the aggregate of the weekly rents for the whole year exceed 10*l*. by any considerable sum, the evidence will increase in force, in proportion to that excess ; and it will then be for the discretion and judgment of magistrates to determine whether the evidence afforded by the weekly rents is, without additional proofs, sufficient to satisfy them as to the yearly value.

If evidence of the yearly value be afforded by means of competent persons, it will be for the opposite party to impugn their evidence by the testimony of persons who make a lower estimate of the value.

If evidence of the yearly value be afforded through the medium of a yearly rent, I do not see how the effect of this evidence can be destroyed, except by showing some fraud in the transaction.

If the yearly value is to be a conclusion drawn from the aggregate of rents reserved at shorter periods of time, the opposite party may give evidence of the actual value, and thus demonstrate the conclusion to be an unsound one.

iv. The last point to be established in evidence is, that Of the proof of

(1) Part I. p. 66.

(2) Ibid.

(3) Part I. p. 70.

residence for 40 days in the parish.

the person who rented the tenement resided for forty days in a parish which contains some part of the tenement. The proof of which residence may be afforded by the person himself, or by any other person who is acquainted with the fact.

Of the proofs of a settlement by renting from 2nd of June 1819, to 22nd June 1825.

II. With respect to the evidence required to make out a settlement since the 2nd June 1819, that is to say, a settlement under the statute 59 Geo. 3. c. 50., there are these several points to be established: 1. That the tenement in question lies in one parish, and that it consists of a distinct and separate dwelling-house or building, or of land, or of both; II. That the tenement, or each of the parcels which compose it, was hired by the party for a year, at the rent of 10*l.* in all; III. That the party had the tenement, or all the parcels composing it, for a whole year; and, if the tenement consisted of land, that he had it in his own occupation for that period of time; IV. That he paid a year's rent for the tenement, or for the parcels composing it; V. That he resided forty days in the parish which contains the tenement.

1. It must be proved that the tenement was all in one parish.

1. It is first to be proved that the tenement lies in one parish; and that it consists of a distinct and separate dwelling-house or building, or of land, or of both.

As for the situation of the tenement, that may be proved by any person acquainted with the parish, and with the tenement in question.

If it is a question whether the tenement is all in one parish, then the bounds of the parish must be ascertained; which may be done either by proof of perambulations;

If indeed the bounds of the parish be in dispute between the parties, recourse must then be had to one or more of those proofs which tend to determine questions of this nature.

The bounds of a parish may be ascertained by means of proofs derived from one or more perambulations; which perambulations must be proved by some person who was present: and these perambulations, in order to entitle them to any weight, should have been made either jointly with the parishioners of that neighbouring parish which lies on the side in dispute, or at least they should have been made under the authority of some act of parliament.

or by proving the exercise of parochial rights within these bounds; or by evidence of reputation.

Or the bounds may be proved by means of parochial rights exercised within them, such as the taking of tithes, the levying and payment of parish rates.

Or, lastly, hearsay evidence, or evidence of reputation, may be called in. The declarations of old persons deceased, the declarations especially of owners or occupiers of the disputed territory, may be adduced to show what has been the prevailing opinion in the parish for many years, and what has been the opinion of those who, living upon the very spot, and having no particular interest to bind them to the one parish

rather than the other, are likely to afford evidence the most valuable in point of knowledge, and the most unexceptionable on the score of interest.

The situation of the tenement being proved, the nature of it must next be shown. And this question, when it is one of mere sense or eye-sight, is, of course, free from all difficulty. Sometimes however, as in cases of burglary, when the question arises upon a dwelling, whether it be a distinct dwelling-house or not, it is not of such easy solution. A definition was in another place given of a separate and distinct dwelling-house, and of a separate and distinct building. (1) The terms and particulars of this definition must be adverted to in order to determine whether any particular tenement is, in point of law, to be considered as such a dwelling-house or such a building as is specified in this statute.

II. It is next to be proved that the party hired the tenement for a year at the rent of 10*l.* at least.

The best evidence of the hiring is the agreement between the lessor and lessee.

If this agreement is by deed or other writing, the deed or writing must, if possible, be produced. If it cannot be produced, then secondary evidence may be given of its contents. (2)

If the agreement was by word of mouth, then the usual proofs should be adduced in order to make out an oral agreement. (3)

It may happen that there are no direct means of proving an agreement between the lessor and lessee. In this case recourse must be had to such evidence as leads to the conclusion that a *bond fide* hiring, though it cannot be expressly proved, did in fact take place, and that it was such as to satisfy the conditions of the statute.

Suppose that it can be proved that A. was the landlord of the premises, that B. occupied them for a year, and paid a year's rent amounting to 10*l.* Now from these facts, it may be inferred that the premises were hired agreeably to the terms of the statute.

If the tenement consists of different parcels, hired of different landlords, or at different times, the same proofs, which were made use of in case of a single hiring, must now be applied to each of the several hirings.

III. It is next to be proved that the tenement was, accord-

It must be shown that the tenement consisted either of land or of buildings, or of both; and that the building was a separate and distinct building.

II. It must be proved that the party hired the tenement at the rent of 10*l.* at least. This may be proved either expressly by means of the lease or written agreement if there was any; or, if no written agreement, then by proof of the parol agreement. Or it may be shown impliedly,

by proving an occupation for a year, and the payment of a year's rent.

III. It must be

(1) Part I. page 75.
(3) Page 111.

(2) Pages 111, 135.

proved that the party held or occupied for a year.

ing to the nature of it, either held or occupied for a whole year by the party who hired it.

This is a matter which, observing what was stated with respect to the different mode of enjoyment, which is by this statute made to vary according as the tenement consists of house, or of land, (1) we shall find to be clear of all difficulty, and reduced to a simple matter of fact, which depends for its proof upon the testimony of any one who can speak from his own personal knowledge of it.

iv. It must be proved that he paid a year's rent.

This payment may be proved by any witness to the fact, or by a receipt, if the lessor or his agent is dead.

If no actual payment was made, there must be proof of a legal tender.

A legal tender is of two kinds, actual and constructive.

Definition of an actual tender.

Definition of a constructive tender.

iv. It is also to be proved that the party having the tenement, paid a whole year's rent for it.

The payment of rent may be proved by the lessor or lessee, or any other person present when it was made; and if the lessor is dead, or if his agent who received the rent is dead, then by any receipt which may have been given for the rent.

A payment in law, if such will satisfy the act of parliament, (2) must be founded upon proof of those facts which the law considers as equivalent to payment; that is, it must be founded upon proof of a legal tender of the debt or sum due, made at the proper place and time.

Now a legal tender is of two kinds. It may be either an actual tender, or a constructive tender.

An actual tender of a debt, or given sum, is an absolute unconditional offer, which a debtor makes to his creditor, of that given sum; such given sum, or a larger sum, consisting of such parts that the given sum can be separated from it, being actually produced and laid before the creditor.

A constructive tender of a debt or given sum, is an offer which the debtor makes to his creditor, of that given sum, which the debtor either declares he has with him and is ready to produce, or which he produces in Bank of England notes, or provincial notes, or which he produces by means of a larger sum of money and asks for change, or to the payment of which sum, being produced in money, he annexes some condition; (3) the creditor, by some express declaration or act tantamount to it, dispensing with such production of money when offered to be made, and absolutely refusing in the other cases, without objecting to the informality or to the condition, absolutely refusing, I say, to receive the sum which the debtor wishes and designs to pay.

If a legal tender of either sort be proved by some person who was present when it was made, or by the lessee who

(1) See part I, p. 75.

(3) Read v. Goldring, 2 M. and S. 86.

(2) See Part I, page 76.

made it, and if it be proved to have been made at the proper time and place, (1) it may perhaps supply the want of an actual payment.

v. It is in the last place to be proved, that the party having the tenement, resided forty days in the parish which contains the tenement. The proof of this needs no explanation.

III. With regard to the evidence required to make out a settlement under the statute 6 Geo. 4. c. 57., that is to say, since the 22d of June 1825, it is necessary to prove, I. the situation and nature of the tenement as in the former case; (2) II. the hiring of the tenement, which, in this case, as it seems, must be taken under one hiring; (3) III. an occupation under the yearly hiring; (4) IV. the payment of the year's rent; (5) V. a residence of forty days in the parish.

v. It must be proved that the party resided forty days in the parish. Of the proofs of a settlement by renting since 22nd June 1825.

CHAP. IV.

On the Proofs of a Settlement by Payment of Rates.

THE subject of a settlement by rating, has been divided into two principal parts. First was considered a settlement gained by being rated and paying rates in respect of a tenement; which consideration was two-fold, consisting, first, of a rating under the stat. 3 W. and M. c. 11. s. 6., and secondly, of a rating under the stat. 35 Geo. 3. c. 101. s. 4. (6) Next was considered a settlement gained by being rated and paying rates in general, and not in respect of a tenement; which mode of gaining a settlement still subsists, by force of the statute of William and Mary. (7)

Following then the division formerly made, I shall, first, remark upon evidence as it relates to a settlement to be gained by being rated, and paying rates in respect of a tenement from the third year of William and Mary, to the 22d June 1795.

Secondly, I shall mention such evidence as is necessary to

- (1) See Part I. page 76.
- (3) Part I. page 77.
- (5) Ibid.
- (7) Part I. page 82.

- (2) Page 150.
- (4) Ibid.
- (6) Part I. page 78, &c.

make out a settlement by rating from the 22d of June 1795, till the 22d of June 1825, the time at which this head of settlement seems to have been abolished.

Lastly, I shall state the means by which a settlement is to be established in virtue of a rating in general, and not in respect of a tenement.

1. Of the proofs of a settlement by rating before the 22nd June 1795.

I. From the 8rd year of William and Mary to the 22nd of June 1795, in order to make out a settlement by rating, the following evidence is necessary.

It must be proved, first, that the person, whose settlement is the subject of inquiry, was either actually or constructively rated in respect of his tenement.

Secondly, that he paid the rate.

Thirdly, that he resided in the parish for the space of forty days after the time when he paid it.

To prove the rating, the rate should, if possible, be produced.

1. In order to prove the rating, the rate itself must, if possible, be produced. If it belongs to the opposite party, then notice should be given to them to produce it. Upon their not producing it, or upon proof of its destruction or loss, then secondary evidence may be given of its contents.

Whether produced or not, unless the non-production be the act of the opposite party, it must be authenticated.

Whether the rate be or be not produced, some evidence must be given for the purpose of authenticating it; unless indeed it be proved to be in the possession of the opposite party, and they, having had notice, refuse to produce it. For in this case the rate seems to stand on the same ground as a deed or written document in similar circumstances. (1)

In all other cases it must be duly authenticated, the best proof of which authentication is afforded by evidence of the hand-writing of the justices who allow it.

If it cannot be produced, secondary evidence may be given.

If the rate cannot be produced, then recourse must be had to secondary evidence.

If a copy given under stat. 17 Geo. 2. c. 3. s. 2., is offered in evidence, it need not be proved to be an examined copy.

If no copy can be produced, then oral evidence may be

Now by stat. 17 Geo. 2. c. 3. s. 2., the churchwardens and overseers are to give to the inhabitants of the parish copies of the rate on demand. If any such copy is produced as secondary evidence, and proved to have been given by the parish officers, it seems to be evidence of the rate, without being proved to be an examined copy, because the parish officers have authority to give such copies. Any other copy must be proved to be an examined copy, that is, to have been compared with the original rate.

No copy being produced, and none being shown to exist within the knowledge of the party proving the rate, oral evidence may be given of its contents.

When the rate, in whatever way it may be proved, is once before us, it then only remains to be seen whether in its terms it applies to the person whose settlement is in question. If it refers to that person by naming him, the only question that can arise is as to his identity; which must be proved by some one who is able to affirm that the person, whose settlement is now in dispute, was the very person that occupied the tenement on which the assessment was made. This identity can, of course, be most easily proved by the party himself.

given of the rate.
If the party is rated in his own name, then his identity is to be proved.

If the rate does not refer to that person by name, it must be shown by distinct evidence that he was the person contemplated by the parish officers in rating the tenement of which he was possessed. There are, in this case, two points to be established. The first is, that he occupied the tenement at the time when the rate was made. The second, that the fact of his occupation at that time was known to the parish officers.

If he is not rated in his own name, it must show that he was the party intended to be rated; by proving that he was the occupier, and that his occupation was known to the parish officers. Instances of assessments not in the party's own name.

Thus it happens that the question, whether the occupier was really and effectually rated or not, although a question of law, cannot always be determined without the aid of extrinsic evidence. As, for instance, if the assessment be upon J. S. or the tenant of Black-acre. (1) Here it is necessary to prove that J. S. was the landlord, and that the person whose settlement is in question, and whom we will call A., was the tenant.

Again; if, as in the instance formerly given, (2) the assessment runs thus: "Late Lowbridge's house," Lowbridge being the name of a former occupier; in this case it is necessary to prove that the occupation of A., at the time when the rate was made, was a fact known to the parish.

And suppose that the rate is upon J. S., a former occupier, who is dead. In this case it must be shown that the parish officers knew that J. S. was dead at the time when they made the rate, and that A. was, at that time, in the occupation of the premises. (3)

Facts of this nature, when necessary, being proved in order to clear up ambiguities, it is then a pure question of law whether the occupier was or was not virtually comprehended in the assessment.

11. The next point to be established is the payment of the rate.

Of the proof of payment.

Whether a payment must actually be proved, or whether it will be presumed, until the contrary be shown, seems to be

Whether a payment must

(1) Part I. page 79.

(2) Part I. page 80.

(3) Ibid.

be proved, or will be presumed without proof, is a matter of doubt.

a question of some doubt. On the one hand, it may be deemed to be the duty of parish officers to raise these levies, and it may therefore be thought proper to presume that they collected the whole amount of them. On the other hand, it might happen that a party who was not a settled inhabitant, and who was likely to become chargeable to the parish, had been inadvertently included in the rate. Under these circumstances, it is probable that payment of the rate would not be exacted. And, perhaps, if any single case can be supposed in which payment would not be demanded, it is too much to presume generally that it was demanded in all.

As to what in law is to be considered a payment, (1) and as to the time when that payment should be made, (2) these several matters have been already considered.

Of the proof of residence.

III. The third point to be proved, namely, that the person rated resided forty days in the parish after the time when he paid the rate (3), is a matter of direct and simple proof.

II. Of the proofs of a settlement by rating, from the 22nd June 1795, to 22nd June 1825.

II. In order to establish a settlement by rating from the 22nd of June 1795, to the 22nd of June 1825, all the proofs required in the former case are necessary; and in addition to those proofs, it must also be shown that the tenement in respect of which the party is rated, was of the yearly value of 10*l.* at the time the rate was made. (4)

III. Of the proofs of a settlement by rating in general, and not for a tenement.

III: In order to make out a settlement by rating in any other respect except in respect of a tenement, I. The rate or assessment, II. The payment of the sum assessed, and, III. The residence of the person assessed must be severally proved in the manner pointed out in the first division of this chapter.

CHAP. V.

On the Proofs of a Settlement by Estate.

Of the proofs of a settlement by estate.

THERE are only two main propositions to be made out in proof, in order to establish a settlement by estate; first, a title to such an estate as will confer a settlement; second,

(1) See page 152.

(3) See Part I. page 81.

(2) Part I. page 79.

(4) See pages 81, 149.

a residence for forty days in a parish which contains some part of the estate.

1. To prove a right to such an estate as, according to the rules laid down in the Chapter on Settlement by Estate, is sufficient in quantity and quality to confer a settlement.

In general, it is a principle of law, that if a party is shown to be in possession of lands or tenements, that possession draws after it the presumption that the party is seised in fee. If now a seisin in fee did, in all cases where the party is in possession, confer a settlement, then, such proof of possession would be sufficient to make out the first of the two propositions above stated; and further proof would be required in those cases only where the party's title does not consist of, or is not accompanied by, possession.

But, as even a seisin in fee does not universally bestow a settlement, for the estate of which the possessor is seised may be an estate purchased for a sum less than 30*l.*, as, I say, this qualification is attached to the principle of common law, and so far limits its operation, it seems doubtful whether proof of possession does, in any case, afford a good *prima facie* evidence of a title to such an estate as is required for the purpose of gaining a settlement. There seems to be no reason for presuming that the party certainly came to the estate by some means other than a money purchase, or that he certainly gave, if he was a purchaser, the full sum of 30*l.* for the estate.

It is, therefore, perhaps unsafe to rely upon simple proof of possession. If this be so, it then becomes necessary, in all cases, to disclose so much of the title of the possessor as excludes the notion of a purchase for a sum less than 30*l.*

The nature of the evidence, necessary for this purpose, will depend upon the nature of the estate, and upon the mode by which the party acquired it.

Whenever a party comes into possession of an estate, immediately upon the death of an ancestor, to whom he is heir at law, or customary heir, it will be presumed that he came in by descent. At any rate, he appears not to be a purchaser for a money consideration.

Whenever, therefore, these facts exist, possession by an ancestor, and succession by an heir, enough of the title is disclosed to make out a *prima facie* case.

To prove the possession of the ancestor and of his successor, the testimony of any one may be called in who is acquainted with these facts.

To prove that the successor is heir at law, or customary

A right must be proved to such an estate as will give a settlement.

Proof of possession alone is not sufficient; for, though from such proof a seisin in fee is to be presumed;

yet the seisin may be of an estate purchased for less than 30*l.*

Therefore, so much of the title must be disclosed as excludes the notice of such a purchase.

In what cases this notion will be excluded.

heir, evidence of his relationship may be afforded by means of persons belonging to the family, who can speak either from their own knowledge of the marriages, births, and deaths, which have taken place in the family, or from what they have heard from deceased members of the family, respecting the relationship of its different members. (1)

Or the relationship of the successor may be proved by means of parish registers, which show such marriages and births as may be required for the deducing of the pedigree; which registers must be accompanied by proof of the identity of the parties named in them. These proofs, together with evidence, to show the death of all persons who stand in a nearer degree of relationship to the ancestor, will make out the heirship of the successor.

Whenever a widow is found in possession of an estate, of which the husband can be proved to have been *exclusively* possessed, before and at the time of the marriage, there is no room for the supposition that she acquired the estate by a money purchase.

In this case, therefore, proof of possession on the part of the husband, before, and at the time of the marriage; proof of the marriage itself, of his death, and of her subsequent possession, will establish her title to such an estate as confers a settlement.

Possession is a matter capable of being proved by any witness acquainted with the fact.

The mode of proving a marriage will be hereafter considered. (2)

A death may be proved either by a witness, who knows the fact, or by means of register of the burial.

In all other cases, proofs of title must be given, varying according to the different modes by which the estate was acquired.

Did the party enjoy the estate as tenant by the curtesy, or otherwise in right of his wife? It is necessary, in this case, to prove the marriage, (3) and either possession by the wife before marriage, or the title by which it came to her after marriage.

Did the party hold as executor, or as administrator, or as guardian in socage, or as tenant by the elegit? In these cases his title must be respectively shown in the following manner:

In what cases title must be proved.
Of the proofs of the title of husband;

of executor;

(1) See 3. Stark. Ev. Tit. PEDIGREE.
(3) Ibid.

(2) See below, Chap. VII.

To prove that he was executor, either the probate must be produced, which, being an original, taken by authority, and of a public nature, is admissible without proof; or, such being the nature of the probate, a copy, proved to be an examined copy of the probate, may be given in evidence; (1) or the Probate Act Book of the Ecclesiastical Court may be produced, (2) or an examined copy of the entry in that book in lieu of the book itself. If the probate has been lost, it is the practice of the Ecclesiastical Courts to grant what is called an exemplification of the probate from their records. (3) The probate being lost, therefore, this exemplification, or an examined copy of it, may be given in evidence. (4)

To prove that a party was administrator, either the letters of administration must be produced, or a copy, proved to be an examined copy, of the letters of administration, may be given in evidence, such copy being, like the copy of a probate, good primary evidence; (5) or the original book of Acts in the Ecclesiastical Court, directing letters of administration to be granted, with the Surrogate's fiat for the same, may be produced; (6) or an examined copy of that entry may be given in evidence. (7) It is not the practice to grant an exemplification of letters of administration, but only a certificate that administration was granted. If, therefore, the letters of administration are lost, their place may be supplied by producing such certificate, or by proving an examined copy of it. (8) But the above-mentioned proof, derived from the records of the Ecclesiastical Court, may be employed, as well after the loss of the letters as before it.

A guardian in socage is a person, who, upon the death of one seised of land holden in socage, the heir to which land is within the age of fourteen, has, by reason of being the nearest in degree of those relations to whom the inheritance cannot, by possibility, descend, or by reason of being, of such relations (if not brothers or sisters, and not lineal ancestors, in which cases the eldest brother or sister, and the father, or other male ancestor, are respectively preferred), the first who seizes the heir, has, I say, by one or other of these reasons, the custody of the land and other hereditaments, and of the person of the heir, till he is fourteen years of age.

(1) 2 Phill. Ev. 342; 1 Phill. Ev. 377.

(3) 1 Phill. Ev. 377.

(5) 2 Phill. Ev. 344.

(7) Davis v. Williams, 13 East, 232.

(2) Cox v. Allingham, 1 Jac. 515.

(4) 2 Phill. Ev. 343.

(6) Elden v. Keddell, 8 East, 187.

(8) See 1 Phill. Ev. 378.

In order to prove the title of guardian in socage, it will be necessary to establish the following facts: i. The seisin of the ancestor, by showing possession of the land, or receipt of rent, or by giving in evidence the declaration of a deceased occupier, or by proving a demise to a lessee, and possession on the part of that lessee; (1) ii. The death of that ancestor; (2) iii. The heirship of the ward; (3) iv. The fact of his being under the age of fourteen at the time of the guardian's entry upon the land, (4) which fact may be proved by any witness acquainted with the family of the ward; v. The relationship of the guardian to the ward, (5) bringing him within the definition above given. (6)

of tenant by
elegit;

If the estate was held under an *elegit*, the following are the requisite proofs: i. The judgment recovered; ii. The *elegit* taken out upon it; iii. The inquisition made by a jury; iv. The sheriff's return, by which the land is assigned to the creditor. (7)

of conusee of
a statute-mer-
chant, &c.

The proofs relating to the title of a conusee of a statute-merchant, statute-staple, or a recognizance in the nature of a statute-staple, are given by Mr. Phillipps, in his Treatise on Evidence, (8) and it will, perhaps, be hardly worth while to state them here.

Title by devise of a freehold interest is to be proved by the will.

Did the party possess the estate, or had he a reversion or remainder, or some equitable interest in it, under a devise, marriage settlement, conveyance in consideration of natural love and affection, mortgage deed, or deed of trust, or some written agreement? Then the devise, if of a freehold interest, must be proved by the production of the will, signed and attested in the manner prescribed by the statute of frauds. (9)

The will must be proved by one of the subscribing witnesses, if any one of them can be called.

And the will must be proved by one of the subscribing witnesses, if any one of them be alive, and can be called; (10) which witness must prove that the will was signed by the testator, or by another person in the presence and by the express direction of the testator, and was attested by the witness, and two others, in the testator's presence. (11) If none of the witnesses can be called, their hand-writing, and the hand-writing of the testator, must be proved. (12)

(1) 2 Phill. Ev. 232, 233.

(2) See page 158.

(3) See page 157.

(4) It seems to be doubtful whether guardianship in socage may continue beyond fourteen. See 2 Phill. Ev. 250. Suppose its legal termination to be at that period, can a guardian, who holds on, after the ward is fourteen, gain a settlement by such holding?

(5) See page 157.

(6) Page 160.

(7) See 2 Phill. Ev. 252.

(8) 2 Phill. Ev. 253.

(9) Stat. 29 Car. 2. cap. 3.

(10) See pp. 111, 135.

(11) 1 Phill. Ev. 479.

(12) 1 Phill. Ev. 483.

If the witnesses are dead, and no proof of their handwriting can be obtained, it will be sufficient to prove the signature of the testator alone. (1)

A will thirty years old, if there has been possession under it, will probably, in all cases, be deemed to prove itself. (2)

If the will is proved to be lost, or to have been destroyed, then the register-book or the ledger-book of the Ecclesiastical Court, setting out the will at length, may be produced as evidence of its contents; (3) or a copy, proved to be a correct copy, may be given in evidence.

The devise, if of a copyhold interest, does not require a signature or attestation. It is sufficient, in this case, to prove a will by the testator, of the same force only as that required for passing personal property. (4)

If the devise be of a lease for a term of years, the interest is a chattel interest, and therefore the probate, and not the original will, is the proper medium for proving it. (5) This proof, coupled with proof of possession under the will, would probably be deemed sufficient to show that the party had such an estate as would give him a settlement, without putting in evidence the lease, or any previous assignment of it to the testator, and without proving the executor's assent. It shows that the party occupied by some title, not derived from a money-purchase, and not depending upon an original demise to himself.

When the claim is under a marriage settlement, or any other conveyance, the respective deeds which contain the settlement, or other conveyance, must be duly proved. (6)

When it is under such a written agreement as will pass an estate sufficient for a settlement, the agreement must be shown to have been executed with the solemnities required by the statute of Frauds. (7)

1. The third section of that statute enacts, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of, any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law."

This section relates to the transfer of subsisting leases,

(1) 1 Phill. Ev. 485.

(3) 1 Phill. Ev. 478.

(5) 2 Phill. Ev. 247.

(7) Stat. 29 Car. 2. c. 3.

(2) See 1 Phill. Ev. 486.

(4) 2 Phill. Ev. 248.

(6) See page 135.

estates and interests ; and therefore, every grant or assignment of any such lease, estate or interest, even if it be but a lease for a year, must be in writing, and signed in the manner above prescribed.

The signature of the party, if he himself signed the agreement, must be proved either by some one who saw him sign, or by some one acquainted with his hand-writing. If, indeed, there is a subscribing witness, the signature of the party should be proved by means of that witness. (1) And if that witness is dead, proof of his hand-writing is proof of the signature of the party, exactly as it would be in any other instrument. (2) When an agent of the party signs for him, his signature must be proved in the same manner as that of the principal would be proved, and the authority given by the principal must also be put in evidence. If that authority was not written by the principal himself, it must be shown to have been written by his directions.

The grant or assignment being thus given in evidence, an actual enjoyment under it being proved, and the consideration, if a pecuniary one, being shown to be of the proper amount, a good *prima facie* case appears to be made out, without going into the title of the grantor. It may well be presumed, until the contrary be made to appear, that the grantor, who could invest his grantee with the substantial rights of ownership, had himself a title resting upon solid foundations.

11. according to the 4th section.

11. The fourth section of the statute of frauds regards only the original creation of interests in land. An agreement for any such interest must be signed by the parties or by their agents ; but the authority of the agent, under this section, is not required to be in writing. And it must be proved, that the whole purchase-money was paid or tendered in payment by the party let into possession. It is only upon such payment, in fact or in law, that a clear equitable interest is supposed to be conveyed. (3)

Proof of a copyhold interest.

If the claim is under surrenders and admittances to a copyhold estate, either the original entries on the Court rolls of the Manor, or copies of those Court rolls, must be produced. (4) If the proof be through the medium of copies, they must be stamped. (5)

Evidence of identity.

To these various proofs, by means of documentary evidence, must, in each case, be added some proof of the identity of the party.

(1) Page 111.

(2) Page 112.

(3) Part I. page 88 ; R. v. Geddington, 2 B. and C. 129.

(4) Doe v. Hall, 16 East, 208.

(5) Ibid.

The title being thus proved by the party maintaining the settlement, it will be for the opposite side to impeach that title, either by matter of law or by matter of fact. Of the means by which a title may be impeached.

The cases in which a title, apparently good, may be most frequently impeached by matter of fact, are cases of estates purchased for a money consideration. Upon the face of the instrument, which conveys such an estate, the amount of the purchase-money may be that required by the statute, while, in point of fact, it may be less. In every such case, the party opposing the settlement may show either that the full sum of 30*l.* was not paid at all, or that it was not paid by the purchaser, but by some person who did not pay it on the purchaser's behalf. (1)

To prove a residence for forty days in a parish which contains some part of the estate, the same evidence must be adduced as is required and has been stated under other heads of settlement. Of the proof of residence.

CHAP. VI.

On the Proofs of a Settlement by Office.

THREE points are to be established in order to prove a settlement by office: First, an appointment to such an office as will confer a settlement; (2) second, the execution of that office for a whole year; (3) third, a residence for forty days in the parish, and in that part of it where some of the duties of the office are exercised. (4) Of the proofs of a settlement by office.

I. As to the appointment. This may either be shown by proof of the formalities or circumstances which attended the first placing of the person in the office; as for instance, by means of the books or rolls of a manor or parish, or by means of witnesses who were present at the appointment, if made by word of mouth. 1. The appointment must be proved;

Or the appointment may be inferred from proof of the exercise of the office. And when the proof is in the last-mentioned way, it will be for the opposite party to impeach the legality or validity of the appointment.

II. The execution of the office for a whole year may be 11. Execution

(1) Part I. p. 93.

(3) Part I. p. 99.

(2) Part I. p. 97.

(4) Ibid.

of the office
for a year.

proved either by the officer himself, or by any person whatever who is able to say, from personal knowledge, that the duties of the office were, in some one instance at least, performed by the person appointed; and that he was reputed in the parish to hold that office. Or it may be proved by showing that another, acting as deputy to the person appointed, officiated in his place. (1)

If a legal appointment is actually proved, then very slight evidence of the execution of the office is all that will be required.

III. Residence
for forty days.

III. It is in the last place necessary to prove a residence for forty days in the parish, and in that part of it where some of the duties of the office were to be performed.

The nature of the office, and the limits within which it was exercised or exercisable being made to appear; proof of residence becomes then the proof of a simple fact; which proof, unless the bounds of the parish are in dispute, is unincumbered with any difficulty.

CHAP. VII.

On the Proofs of a Derivative Settlement.

A DERIVATIVE settlement being a settlement derived out of a settlement previously acquired by one who is the head of the family; (2) and the settlement of the head of the family being assumed to be a known or given settlement; it only remains to show that, in point of fact, the party, for whom the derivative settlement is claimed, stands in such a relation to the other, that the known settlement at once devolves upon him. That is, it must be shown that the woman, for whom a settlement is claimed by marriage, is really the wife or widow of the man whose settlement is supposed to be known; or that the child, for whom a settlement by parentage is claimed, is really the legitimate child of the parent upon whom such settlement depends.

Next, with regard to marriages since the 1st of November, 1823, which are governed by the statute 4 Geo. 4. cap.

(1) Part I. p. 99.

(2) Part I. p. 100.

I. To prove that B., the woman in question, is really the wife or widow of A.

Besides any evidence which may arise from such an acknowledgment or admission as is binding upon the parish making it, (1) there are four kinds of proof by which a marriage may be established in settlement cases. First, by direct and immediate proof of the fact;

Secondly, by hear-say evidence;

Thirdly, by what is called reputation;

Fourthly, by a sentence in the Spiritual Court.

I. With regard to the first species of proof, that is to say, direct and immediate evidence of an actual marriage; such evidence may be afforded either by means of a witness who was present at the marriage; or by means of the parish register, accompanied with proof of the identity of the parties. (2)

And such proof of an actual marriage will vary according to the time and place at which it was solemnised.

First, with regard to marriages under the first marriage act, (3) which ceased to operate after the 1st November, 1823; if such a marriage took place in a parish church, it will be presumed that the church was one in which marriages may lawfully be celebrated. (4)

If the marriage took place in a chapel, between the passing of the first marriage act, statute 26 Geo. 2. c. 33., and the 23d August, 1808, (5) then it is only necessary to prove that such chapel was consecrated. For if the ceremony of consecration had been performed, the marriage was, by express statutes, declared to be a valid one. (6)

If a marriage under the first marriage act took place in any chapel whatever, subsequently to 23d August, 1808; or if it took place prior to that time, in a chapel which had not been consecrated; then it is necessary to prove that the chapel, at the date of the marriage, was one in which marriages might legally be solemnized. (7) Proof of this may be afforded by producing old registers of marriages solemnized in such chapel antecedently to the first marriage act, (8) and registers of banns published there since, and by showing by living testimony that marriages have been usually celebrated there. (9)

1. Of the proof of a settlement by marriage.

Besides estoppel, there are four modes in which a marriage may be proved.

I. It may be proved by immediate evidence of the fact.

(1) See *New Windsor v. White Waltham*, 1 Stra. 186; *Maldstone v. Hedcome*, 2 Stra. 1233., cases of Acknowledgment by Certificate; and *R. v. Silchester*, Burr. s. c. 551; *R. v. Binegar*, 7 East, 377; Orders of Removal unappealed against.

(2) 2 Stark. Ev. 933.

(3) Stat. 26 Geo. 2 c. 33.

(4) See 2 Stark. Ev. 932.

(5) See below, p. 169.

(7) *Taunton v. Wyborn*, 2 Camp. 297.

(8) Stat. 26 Geo. 2. c. 33,

(6) *Ibid*,

(9) 2 Stark. Ev. 933, 944; *Taunton v. Wyborn*, 2 Camp. 297,

76., nothing more seems to be in the first instance necessary, beyond proof of an actual marriage; and whether celebrated in a church or chapel, the evidence will be the same. In both cases it will be presumed, until the contrary is made to appear, that the place was one in which marriages could legally be solemnized. And, indeed, even if the marriage had occurred in a chapel where banns could not lawfully be published, still, having actually taken place, it could not be invalidated by that circumstance, unless the parties were cognizant of it. (1)

2. A marriage may be proved by hear-say evidence of the fact.

11. The next mode of proving an actual marriage is by the declarations, oral or written, of persons deceased, as to the fact of the marriage having taken place.

The declarations now under consideration, are declarations by deceased persons as to their knowledge of particular facts, and not merely as to the general repute in the family. Upon all other subjects where hear-say evidence is admitted, as, for instance, in cases of general rights which depend on immemorial usage, a declaration with regard to a particular fact is inadmissible. But in matters of pedigree, facts like that of marriage may be proved by what deceased persons have said respecting them. (2)

The persons whose declarations are offered in evidence, should be proved to be,

This being the subject matter of the declaration, the question occurs by whom may it be made so as to be admissible in evidence? The person who made it must be shown to have been in a situation which rendered it likely that he should be acquainted with the fact. And how is this competency on his part to be proved?

either parties;

If the person, whose declaration is tendered in evidence, is proved to be one of the parties whose marriage is in question, there is a full certainty that he was in a situation to have entire knowledge of the fact. If he is proved to be related to the family of either of the parties, that which was certain in the former case, is at least highly probable in this. (3)

or intimate friends; or servants.

If a person, not related to either family, made an assertion during his life-time, that the marriage in question had to his knowledge taken place, such assertion could not be given in evidence without proving either that he had lived on terms of intimacy with one or both of the parties, (4) or that he had lived in the capacity of a servant to one or other of their families. That servants may make a declaration as

(1) Stat. 4 Geo. 4. c. 76. s. 22.; see below, p. 172.

(2) Berkeley Peerage, 4 Camp. 415. opinion of Mansfield, C. J.; 3 Stark. Ev. 1110, 1111, the notes.

(3) See 3 Stark. Ev. 1102.

(4) See in R. v. Eriswell, 3 T. R. 723, what is said by Lord Kenyon; see also 1 Phill. Ev. 228, and 3 Stark. Ev. 1103.

to what was reputed in the family, seems to have been assumed in the case of the Banbury peerage. (1) And if they can speak to reputation, they can speak to facts. In the case of intimate friends or of servants, the same probability arises that the declaration was uttered by a competent person.

It may here be remarked, that in order to prove that the person who made the declaration really was a servant or particular friend, evidence must be adduced distinct from the declaration itself. A deposition, for instance, purporting to be made by a servant or friend, is no evidence of his being either the one or the other. (2)

It is laid down in Buller's Nisi Prius, 294., that declarations by deceased parents (that is, by the parties themselves) as to their being or not being married, (and if it is so with these, it is so with all declarations,) are not to be given in evidence directly, though they may be assigned by a witness as a reason for his belief one way or the other. But it may, perhaps, be doubted, whether, upon principle, these declarations are not admissible as direct and immediate evidence of the fact of marriage or no marriage.

Upon the whole, it may be observed, that in order to make a declaration evidence, two preliminary points are to be established: First, that the person, whose declaration is thus offered, is deceased; (3) secondly, that his connexion with the family, to which the tradition relates, was of such a nature as to give him peculiar means of knowing the fact. (4)

If it appears that a controversy had arisen in the family, upon the subject to which the declaration refers, before that declaration was made, then being made *post litem motam* it cannot be admitted in evidence at all. (5)

III. The third mode of proving a marriage is by what is called reputation. Living witnesses may show that the parties cohabited as man and wife. Or the declarations of persons deceased may be given in evidence for the purpose of proving that they were considered as man and wife by their respective families or friends.

A declaration as to repute, stands upon the same footing as a declaration relating to express facts. The person making it must, in both cases, be shown to have been, from

And no declaration can be admitted that is made *post litem motam*.
3. A marriage may be proved by reputation. Cohabitation as man and wife how proved.

(1) So said by Bayley J. in *R. v. All Saints*, Sittings in Banc. after Hilary Term, 1828.

(2) Said by Bayley J. (see note (1),) to have been so ruled as to servants in the Banbury Peerage, 1809.

(3) As to the mode of proving a death, see page 158.

(4) 1 Phill. Ev. 227, 228.

(5) 1 Phill. Ev. 231, 233.

his connexion with the parties, competent to speak upon the subject. (1)

4. A marriage may be proved by a sentence in the Spiritual Court;

which sentence is in all cases conclusive.

Mode of proving such a sentence.

A marriage may be disproved

by a sentence of nullity;

or by showing that there was no marriage in fact, or that it was an illegal one.

IV. The fourth mode of proving a marriage is by a sentence in the Spiritual Court in direct affirmance of the marriage. (2) Such a sentence is the decision of a court of competent and exclusive jurisdiction upon a question, which, when once fairly and fully investigated, should, upon principles of public policy, be for ever left at rest; unless, indeed, the court which pronounced the decree, is satisfied of the propriety of disturbing it. As long, therefore, as it remains unreversed, it is conclusive proof of the marriage, not only between the parties to the suit, but also for and against all the world besides. (3) Unless impeached on the ground of fraud or collusion, the sentence absolutely determines the question of marriage, in whatever court, or between whatever parties, it may arise. (4)

A sentence of the Ecclesiastical Court is to be proved either by the production of the book which contains the minutes of the proceedings, or by an examined copy of those proceedings. (5)

With regard to the three first modes of proving a marriage, there is a variety of ways in which they may be controverted, and their effect destroyed.

In the first place, if there has been a sentence in the Ecclesiastical Court, directly upon the marriage, and absolutely declaring it null and void, it will have the same force in overthrowing the supposition of a lawful marriage, which an affirmative sentence has in establishing a similar conclusion.

But if there has been no such final decree in disproof of the marriage, some one of the following modes of contesting the fact, or impeaching its validity, must be resorted to.

If the party who has to establish the settlement relies upon the proof by reputation, it will be for the opposite side to overthrow this *prima facie* case, by showing either that no marriage was contracted between the man and woman, or that such marriage was illegal and void.

If an actual marriage is proved, then it will be for the opposite side to impeach it, by showing that it was not a marriage which the laws recognize as valid and complete.

Now in order to show that no marriage in point of fact ever took place between the man and woman, either the one

(1) See p. 166; and *Doe v. Deakin*, 4 B. and A. 443.

(2) 1 Stark. Ev. 229.

(4) 1 Stark. Ev. 241.

(3) *Bunting's case*, 4 Co. 29.

(5) 1 Stark. Ev. 250.

or the other of them may be called as a witness, and may give evidence to that effect. (1) If they are dead, then the declaration of either of them may be admitted for the purpose. (2) And so may the declarations of any deceased persons, who were connected with their respective families. (3)

In order to show in any case that the pretended marriage was illegal and void, it must be proved that the marriage was not concluded according to the formalities which are prescribed, as essential to its validity, by the law under which the parties were living at the time of the marriage.

Before the 25th March 1754, any marriage between parties, who were at the time living under English law, might be contracted *per verba de presenti*, in the presence of a priest, whether Catholic or Protestant. (4) And the ceremony was not required to be performed in a church or chapel. (5)

Marriages before stat. 26 Geo. 2.

In England, from the 25th March 1754, to the 1st November 1823, all marriages, unless one of the parties was of the Royal Family, (6) or both of them either Jews or Quakers, (7) could only be good and valid marriages if solemnized in one or other of the following ways; namely,

Marriages in England since stat. 26 Geo. 2. before stat. 4. Geo. 4.

i. By special license from the Archbishop of Canterbury, in any place whatever;

ii. By banns or license in a church, or in some public chapel where banns had been before 1754 usually published; (8)

iii. By banns or license before 23d August 1808, in any church or chapel which had been erected since the stat. 26 Geo. 2. and which was consecrated; (9)

iv. By banns or license in the chapel of any consolidated chapelry, under the stat. 59 Geo. 3. c. 134. sect. 6. and sect. 16.

If the marriage was not solemnized in some such place, or if, being solemnized there, it was without either banns or license; then it was null and void to all intents and purposes whatsoever. (10)

And under this stat. of Geo. 2. no minor, unless a widow or widower, could be married by license, without the consent

Marriages of minors, by

(1) *R. v. St. Peter's Worcester*, Burr. s. c. 25; *R. v. Bramley*, 6 T. 330; *Standen v. Standen*, Peake's, N. P. C. 32. (2) See page 166.

(3) *Ibid*.

(4) *R. v. Brampton*, 10 East, 288; *R. v. Fielding*, 5 St. Tr. 614., cited in *R. v. Brampton*, 10 East, 288.

(5) *R. v. Fielding*, 5 St. Tr. 614. 10 East 289; and see 2 Stark. Ev. 932.

(6) Stat. 26 Geo. 2. c. 33. s. 17.

(7) Stat. 26 Geo. 2. c. 33. s. 18.

(8) *King's Norton v. Northfield*, Doug. 659.

(9) Stat. 21 Geo. 3. c. 53; stat. 44 Geo. 3. c. 77; stat. 48 Geo. 3. c. 127.

(10) Stat. 26 Geo. 2. c. 33. s. 8.

license, without consent of parents or guardians.

of parents or guardians. Any marriage by a minor without such consent was invalid; (1) and several were set aside, until the stat. 3 Geo. 4. c. 75. interposed, repealed the clause which declared such marriages void, and established the validity of those before that time solemnized, provided sentence of nullity had not been already pronounced.

Of the requisites to a good marriage under the stat. 26 Geo. 2. c. 33.

The evidence required to be given in the first instance on the part of those who seek to establish a marriage under the first marriage act, (2) has been already stated. (3) It is not necessary for them to give in evidence either the license or the publication of banns; (4) nor need the witnesses to the entry in the register be called. (5) Nor is proof required that the officiating minister was in orders; (6) that will be presumed from the place in which the marriage ceremony was performed. It will be for those who impugn the marriage to show that there was a defect in the publication of banns, or in any other essential point.

Banns ought to be published three times;

With regard to banns, it was required that they should be published three times. If published only once or twice, the notice required by the act was imperfect, and the marriage consequently bad. (7)

and in the true names of the parties.

It was also required that they should be published in the true names of the parties. (8)

Names acquired by repute, how far to be considered as the true names.

Now the true names of the parties, so far as relates to the validity of their marriage, are not only their baptismal names and those surnames by which they may have been originally designated, but also those christian names and surnames, which they had acquired by repute and had held up to the time of the marriage, provided they were not assumed for the purpose of fraudulently contracting that marriage.

Thus, for instance, where a party, whose name was Abraham Langley, had lived in the parish of L. for three years under the name of George Smith, and the banns were published in that name, it was held that such publication was good and valid. (9)

If a party had assumed the name for some purpose, however fraudulent or illegal, not connected with that marriage, then it would still be the true name within the meaning of the first marriage act. As for instance, where a man of the name of Joseph Price came into a place and

(1) Stat. 26 Geo. 2. c. 33. s. 11.

(3) Page 165.

(5) *Birt v. Barlow*, Doug. 170.

(7) Stat. 26 Geo. 2. c. 33. s. 8.

(9) *R. v. Billingshurst*, 3 M. and S. 250.

(2) Stat. 26 Geo. 2. c. 33.

(4) See 2 Stark. Ev. 932, 933.

(6) See 2 Stark. Ev. 932.

(8) See 2 Stark. Ev. 934, 935.

resided there for sixteen weeks under the name of Joseph Grew, which he assumed for the purpose of concealment, being a deserter, it was held that Grew was his reputed name. (1)

Having thus ascertained what is to be considered as the true name of a party, we may lay down the following rules :

First, that if the names were the true names in the sense of the above definition, no intention of fraudulently contracting a marriage rendered it void. Suppose a marriage contracted by a minor under circumstances most clearly indicative of a purpose to do so in fraud of a parent's rights. These circumstances cannot be admitted in proof to invalidate the marriage, the act of Parliament having been strictly complied with. (2)

The second rule is, that where the name or names were totally different, the marriage was void, even though there were no fraud practised or devised. "If the variations are *total*, the rule of law respecting them cannot be doubtful. It never can be contended that such names can be deemed true designations. Nor could one have supposed that such names could have been used but for the purpose of gross fraud, if the case of *Mather v. Ney* (3) had not occurred, in which the woman from a mere idle and romantic frolic, insisted on having her banns put up in the name of Wright, to which she had no sort of pretension. Such a publication, whether fraudulently intended or not, operates as a fraud, and is therefore held to invalidate a marriage." (4)

The third rule is, that where there were *partial* variations, the matter was open to explanation. "Variations may consist in the alteration of one letter only, as it did in *Dobbyn*s for *Dobbyn*; in more than one, as *Widowcroft* for *Meddowcroft*; (5) in the suppression of a name where there are more than two, as *William Pouget* for *William Peter Pouget*; (6) in the addition of a name where there are only two known," as in *Sullivan v. Sullivan*, (7) where the name of *Holmes* was, on publishing the banns, for the first time interposed in the description of *Maria Oldacre*; in *Heffer v. Heffer*, (8) where the banns were in the name of *Anna Sophia Colley*, instead of *Anna Colley*, and in other cases to the same effect. (9) "Such varieties may arise not only from

Three rules upon the subject of fraud.

i. If the names were the true names, no fraud vitiated the marriage;

ii. If the variation of name was *total*, the marriage was void; though there was no fraud.

iii. *Partial* variations might be explained.

(1) *R. v. Burton upon Trent*, 3 M. and S. 250.

(2) See *Sullivan v. Sullivan*, 2 Hagg. 256.

(3) 2 Stark. Ev. 935, 3 M. and S. 265.

(5) 2 Hagg. 207.

(4) 2 Hagg. 254.

(6) 2 Hagg. 142.

(7) 2 Hagg. 238.

(8) 3 M. and S. 265.

(9) See 2 Hagg. 255, in the notes.

fraud, but from negligence, accident, error from unsettled orthography, or other causes consistent with honesty of purpose. They may disguise the name, and confound the identity, nearly as much as a total variation would do, in which case the variation is for the very same reason fatal, from whatever cause it arises. When it does not so manifestly deceive, it is open to explanation if it can be given. If the explanation offered implies fraud, that fraud will decide any doubt concerning the sufficiency of the name to disguise the party." "If the explanation refers itself to causes perfectly innocent, and if it be supported by credible testimony, overcoming all the objections that may be applied against its truth, the Court will decide for the explanation, and against the sufficiency of the variation to operate as a disguise, where no such effect was intended. If the explanation should leave the matter doubtful, then evidence of general fraud intended may be let in, to decide what is left undecided on the explanation." (1)

A marriage by license was not vitiated by a false name in the license.

With regard to a marriage by license, that was never vitiated by the substitution of a false name in the license. (2) This distinction, which is clearly established in the Ecclesiastical Courts, was not adverted to in *Rex v. Burton upon Trent*, (3) a case of a marriage by license, which was argued as if standing upon the same grounds as a marriage by banns.

In what cases, since stat. 4 Geo. 4. c. 76., marriages are null and void.

From the 1st November 1823, the stat. 26 Geo. 2. ceased to be law. And under the stat. 4 Geo. 4. cap. 76., which repealed it, if any persons knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license ;

Or knowingly and wilfully intermarry without due publication of banns, or license first had and obtained ;

Or knowingly and wilfully consent to, or acquiesce in the solemnization of marriage by any person not being in holy orders ;

The marriages of minors by license, without the consent of parents &c. not void.

The marriages of such persons are to be null and void. (4)

With regard to the marriage of minors without obtaining the consent of parents or guardians, the stat. 4 Geo. 4., though it requires such consent to be given, and to be deposited to before a license is to be granted, (5) does not

(1) *Sullivan v. Sullivan*, 2 Hagg. 254—256.

(2) *Cope v. Burt*, 1 Hagg. 434.

(4) Sect. 22.

(3) 3 M. and S. 250.

(5) See sections 14, 16.

declare such marriages null and void. If once solemnized, therefore, without such consent, they are valid marriages. (1)

Marriages of persons living out of England, in places subject to English law, are not affected by the marriage acts, the operation of these acts being expressly confined to England. (2)

The marriage acts are confined to England.

As to these last-mentioned marriages, such at least of them as are contracted between persons living in Christian countries, they must be contracted according to the forms required by the law of the land in which they are solemnized. And this upon the general principle of international law, that contracts should, as to forms and solemnities, be governed by the law of the place in which they are entered into; (3) unless the contract entered into has immediate reference to the law of another country, or is to be performed in some other country. (4)

Marriages out of England must be contracted according to the law of the place. Rule upon this subject.

With respect to marriages among Jews and Quakers, they must be contracted with the solemnities required by the laws and customs which respectively prevail among them. The requisites to a Jewish marriage were fully considered in the case of *Lindo v. Belisario*, (5) and in that of *Goldsmid v. Bromer*, (6) both in the Consistory Court. And it would be entering too much into detail to state them in this place. In a marriage of Quakers, the principal ceremony seems to be a public declaration of the marriage at their monthly meetings. (7)

Marriages of Jews or Quakers must follow the laws and customs which prevail among them.

From what has been laid down respecting the validity of marriages, it will easily be seen in what manner a marriage is to be impeached.

Was it contracted in England before the first marriage act, that is, before the 25th March 1754? or out of England, at any time before or since that Act, in some place where English law prevails? Then in order to invalidate any such marriage, the contract must be shown to have been expressed by words not of present signification, or to have been entered into without the presence and assistance of a priest. (8)

A marriage in England before the first marriage act, and a marriage in any place that is under English law, how impeached.

If the marriage was contracted in England after the first marriage act, and before the 1st November 1823, it may be

A marriage in England, be-

(1) *R. v. Birmingham*, East. T. 1828.

(2) Stat. 26 Geo. 2. c. 33. s. 18; Stat. 4 Geo. 4. c. 76. s. 33.

(3) See *Ruding v. Smith*, 2 Hagg. 393; *R. v. Brampton*, 10 East, 286.

(4) Huber, cited by Lord Mansfield, in *Robinson v. Bland*, 2 Burr. 1077.

(5) 1 Hagg. 216., and see Appendix to 1 Hagg. p. 7.

(6) 1 Hagg. 324.

(7) 1 Hagg. Append. p. 9.

(8) See page 169.

tween 25th
March 1754,
and 1st No-
vember 1823,
how impeach-
ed.
A marriage
since 1st No-
vember 1823,
how impeach-
ed.

A marriage of
Quakers or
Jews, a mari-
riage in Scot-
land or in any
foreign chris-
tian state, how
impeached.

Marriages
universally
may be im-
peached,

by proving a
former sub-
sisting mari-
riage,

or want of
reason in one
of the parties.
By stat. 15
Geo. 2. c. 33.,
no lunatic can
marry until
declared of
sound mind.

II. Of the
proof of a set-
tlement by pa-
rentage.

shown that it was not solemnized according to any one of the modes, which have been before pointed out as the only valid modes of solemnizing a marriage during that period. (1)

In the case of a marriage in England since the 1st November 1823, if it was without banns or license, it may be shown that the want of banns and license was known to the parties. (2)

If it was by banns, then it may be shown that the parties knew that the banns were not duly published. (3)

If by banns or common license, it may be shown that the marriage was knowingly solemnized by the parties in some other place than a church &c. ; or that the ceremony was, with the knowledge and consent of the parties, performed by some person not in holy orders. (4)

If the marriage was between Quakers or Jews, or in any country such as Scotland to which the English laws do not extend, or in any foreign Christian state, then it must be made to appear that the contract did not pursue those forms, which by the rules laid down among Quakers, or by the Jewish law, the law of Scotland, or the law of the foreign state, are deemed necessary and indispensable requisites in the solemnization of marriage. (5)

In addition to the above local, and special, and limited reasons for impugning a marriage, there are two other grounds of a general nature, on which it would be deemed invalid and illegal :

First, a marriage, wherever celebrated, might at any time, and still may, be avoided by showing that one of the parties was bound by a previous marriage which was subsisting in full force at the time of making the second engagement.

Secondly, a marriage may everywhere, and might at all times, be avoided by showing that one of the parties was incapable of contracting from want of reason. And the law of England goes beyond this. For by stat. 15 Geo. 2. cap. 33., where a party has been found a lunatic under a commission, or committed to the care of trustees, he is declared incapable of marrying until he has been pronounced to be of sound mind by the Chancellor, or by the majority of the trustees.

II. To prove that B. the person for whom a settlement by parentage is claimed, is really the legitimate child of A.

There are two points here to be considered ; first, the

(1) See page 169.

(3) Ibid.

(5) See page 173.

(2) See page 172.

(4) Ibid.

marriage of A., the parent ; second, the birth of B., a child of this marriage.

With respect to the first point, that has been already discussed under the former head of Settlement by Marriage.

With respect to the second point, the birth of the child within lawful wedlock ; that may either be shown by direct proof of the birth and time of birth, as by means of the mother or any one else personally acquainted with the fact ; or by the declarations oral or written of deceased relations, who might be acquainted with the circumstances ; (1) or through the medium of the register accompanied with proof of identity.

Or it may be shown that the child was held to be the legitimate child of its parents, was so treated and considered by the family. And this is the proof by reputation. Any declarations made to this effect by relations now deceased, may be given in evidence. And even proof that the child was reputed legitimate by the neighbourhood in general, seems to be admissible proof ; (2) for such reputation in the neighbourhood, if it existed at all, must have arisen from the manner in which the child was treated in its own family, and the light in which it was held forth to the public.

In whatever way the legitimacy of the child may be attempted to be proved, it is still open to the opposite party to show that the child in question was not, in law and fact, a child of the marriage.

For, in the first place, it may be proved, by the father or mother or any other relation, if alive, or by their declarations, if dead, or by any other legal mode of proof, that the child was born before the marriage. (3)

Or, in the second place, the marriage may be impeached in any of the ways formerly pointed out. (4)

And even if the marriage be unimpeachable, and though the child was born after the marriage, and the husband was even living in the same house with the wife at the period when, according to the ordinary course of nature, he might be the father of the child ; even under these circumstances, affording as they do the strongest apparent proofs of legitimacy, evidence may still be adduced to show that the husband was not the father of the child. For, though living in the same house, he might not have had access to his wife ; (5) and this fact of non-access may be proved, like any other

First, the marriage of the parents must be proved, as before ; Secondly, the birth of the child, within lawful wedlock, is to be shown, either by direct proof,

or by proof of reputation in the family, or even in the neighbourhood.

On the other side it may be shown,

that the child was born before the marriage ; or the marriage itself may be impeached ; or non-access of the husband may be shown,

and non-access is to be

(1) See 3 Stark. Ev. 1101—1116.

(2) 3 Stark. Ev. 1117—1119.

(3) Goodright v. Moss, 2 Cowp. 591.

(4) See pages 173, 174.

(5) Banbury Peerage claim, Selw. N. P. 732, note (44) 5th Edition,

proved like any other fact; but it cannot be proved by either the husband or wife. fact; (1) not indeed by the husband or wife, for reasons of policy, (2) but by any other witnesses whatsoever. So that sufficient evidence may, even in this case, be afforded to bastardize the issue. And if in this case, then likewise in any other case which may be supposed.

CHAP. VIII.

On the Proofs of a Settlement by Birth.

To prove that the party was born in a particular parish, no hear-say evidence is admissible.

THE party seeking to establish a settlement by birth, must prove that the person in question was born in the parish where the settlement is claimed; and also, if such proof be deemed in law essential to the completion of the settlement, (3) that the person resided at some time or other forty days in the parish.

1. The fact of a birth taking place, or not taking place, in a particular parish, is entirely a question of locality. No hear-say evidence can be admitted; (4) for such evidence is applicable only to facts strictly belonging to pedigree, such as births, marriages and deaths, with their respective dates. Beyond this hear-say evidence cannot go.

The fact of the birth to be proved by witnesses; cannot be proved by the party himself.

Now in order to prove this fact of locality, some person should be called who was either present when the child was born, or was in the parish at the time and saw the child soon after its birth; or who saw the parents or the mother continually in the parish both before and after the time when, by independent evidence, the birth is proved to have taken place.

It is quite clear that the place of birth can never be wholly proved by the party himself. His earliest recollections cannot by possibility go back to such a period as to lay a foundation for presuming that he was born in a particular parish. (5)

The register of baptism *per se* is no proof of the

The register of the baptism is, *per se*, no evidence that the child mentioned in it was born in the parish. (6) If indeed it was proved that the child was then very young, the register

(1) Banbury Peerage, Selw. N. P. 731.

(2) Selw. N. P. 730, 731; R. v. Kea, 11 East, 132.

(3) See Part I. page 107.

(5) See R. v. Trowbridge, 7 B. and C. 252.

(6) R. v. North Petherton, 5 B. and C. 508.

(4) R. v. Erith, 8 East, 539.

would be presumptive evidence that it was born in the place where it was baptized; but if the child were not then young, the circumstance of its having been baptized in a particular parish, would afford no presumption that it was born there.

II. With respect to proof of residence, if any such proof be necessary, enough has been said under the preceding heads of settlement.

Place of birth.

II. Of the proof of residence, if any be necessary.

CHAP. IX.

On the Evidence derived from an Order of Removal, from a Certificate, and from Relief.

BESIDES the direct proofs of a settlement having been gained in some one or other of the methods pointed out in the preceding chapters, evidence to show that the settlement was in some particular parish may be afforded, in some cases, either by the provisions of the legislature, or by the act of the particular parish, or by both conjointly. And this, although the mode, by which such settlement was acquired, is not made to appear.

I. The first species of evidence is that which is afforded by an order of removal, and derives its force from those legislative enactments which invest magistrates with power to make, confirm, or quash such orders.

I. Of an order of removal.

Now an order of removal is an adjudication that the settlement of A. is in the parish of Q.

If the parish of Q. acquiesces in this order; (1) or if, on their appealing against the order, it is confirmed; (2) in either of these cases the order is conclusive evidence, having the same force as a judgment in *rem*. It is conclusive evidence to show that the settlement of A. was, at the date of the order, in the parish of Q. And having the same effect as a judgment in *rem*, it is not merely conclusive between the two litigating parties, but is conclusive to all the world. (3)

If acquiesced in, or on appeal confirmed, it is then conclusive evidence in favour of all parishes.

(1) *R. v. Kenilworth*, 2 T. R. 598; *R. v. Corsham*, 11 East, 388.

(2) *Harrow v. Ryslip*, 2 Salk. 524; and see *Mynton v. Stony Stratford*, 2 Salk. 527; *R. v. Cirencester*, Burr. s. c. 17; *R. v. Bentley*, Burr. s. c. 425.

(3) See Phill. Ev. Vol. I. page 311, and cases in notes (1) and (2).

If quashed upon the merits, it is then only conclusive between the two parishes, and is no evidence for a third parish.

If, on appeal by the parish of Q., the order of removal is quashed upon the merits, this judgment of the sessions is only a negative finding, which amounts to this: that upon the case, as made out to them, the pauper is not settled in Q. (1) But a third parish may be able to give better evidence. Therefore it is reasonable that the quashing of the order should be conclusive only between the two first parishes. (2) It seems, indeed, to be no evidence at all, for or against a third parish.

If quashed for matter of form only, it is no evidence at all.

If the order of removal is quashed for matter of form only, and not upon the merits, it is not conclusive between the two first parishes, nor, indeed, any evidence at all as to a settlement. (3) But in this case, upon the quashing of the order, care should be taken, on the part of the appellant parish, to have a special entry of the judgment made by the clerk of the peace; in order to render it easier, on any subsequent occasion, to show the grounds upon which the order was quashed. (4)

Of the mode in which an order of removal is to be proved.

It only remains now to be considered, in what manner an order of removal, or an adjudication of the sessions, is to be proved.

First, with respect to the proof of an order of removal, if the original order is in existence, it should be produced. The officers of the parish which has possession of the order, or some one of them, at least, should be summoned, by a *subpoena duces tecum*, to attend at the sessions and produce the order.

If the order is in the possession of the opposite party, notice should be given to them to produce it. (5)

If the order is lost or destroyed, evidence of such loss and destruction, together with proof of authentication, and, if in the possession of the opposite party, who have had notice to produce it, the evidence of such possession and notice, without proof of authentication, should be first adduced. After which, secondary evidence, by a copy, if one exists, by oral testimony, if no copy exists, may be given of its contents. (6)

How to be authenticated:

The authentication, which is necessary in all but the excepted case of possession by the opposite side, should be by proof of the hand-writing of the magistrates, and perhaps

(1) *R. v. Bentley*, Burr. s. c. 425.

(2) *R. v. Cirencester*, Burr. s. c. 17.

(3) *R. v. St. Andrew's Holborn*, 6 T. R. 613.

(4) The grounds of quashing an order may be shown, notwithstanding there was no such special entry. *R. v. Wheelock*, 5 B. and C. 511.

(5) See page 113.

(6) *Ibid. R. v. Metheringham*, 6 T. R. 556.

of their being justices of the peace. All other requisites prescribed by the statutes relating to removals, will be presumed to have been properly pursued, until the contrary is made to appear. And, indeed, the contrary cannot, in all cases, and under all circumstances, be made to appear. For if an order has been made, removing a pauper to the parish of Q.; if that order has been executed, and the parish of Q. has acquiesced under it; in this case the parish of Q. can take advantage of those defects only which appear upon the face of the order, and is not allowed to go into proof of circumstances which would invalidate the order. For the parish might have appealed against it. (1)

In what cases an order may be controverted,

But if the removal be to a place which has no overseers, then the order is an absolute nullity, (2) and may be so treated by all the world. Or if the removal be to the parish of Q., and the order happen not to have been executed; in this case, too, all defects whatsoever in the order, or in the jurisdiction of the magistrates, may be taken advantage of by the parish of Q. at any time, because the parish, not being aggrieved, could not appeal.

or treated as a nullity.

To enable us to determine in what cases and to what extent an order of removal may be controverted, the following considerations are to be attended to:

Rules for determining when and how far an order may be controverted.

In the first place, it is clear that an order, which is a good order upon the face of it, and which is to be impeached only by extrinsic evidence, is not void, but only voidable upon appeal. (3)

Secondly, an order, which upon the face of it is a bad order, may be treated as a nullity, even by the parish to which the removal was actually made. (4)

And, thirdly, it may be taken as a rule, though not to be found expressly laid down in any case or by any authority: that where a parish had an opportunity of appealing, and of producing evidence to impeach the order, and did not appeal, it cannot on any other occasion take advantage of such defects in the order as require extrinsic evidence to make them appear; (5) but that where a parish had no such opportunity of appealing, it is on any occasion whatever entitled to the benefit of all such objections as would prove fatal to an order when appealed against.

As therefore it may sometimes happen, upon the production of an order of removal as evidence of a settlement,

Of the points which are es-

(1) *R. v. Stotfold*, 4 T. R. 596.

(2) *R. v. Swalcliff*, 4 Burn's J. 754.

(3) *R. v. Stotfold*, 4 T. R. 596.

(4) *R. v. Chilverscoton*, 8 T. R. 178.

(5) This part of the rule is, perhaps, supported by *R. v. Stotfold*, 4 T. R. 596.

essential to an order of removal, as matters of fact.

that the party, against whom it is produced, may urge objections of the nature above stated against its validity, and as such objections are always permitted upon an appeal, it will be useful in this place to consider what are the several points which are essential to a good order of removal, as well those which are the subject of extrinsic evidence, as those which should appear upon the face of the order. With regard to the former,

First, a complaint must be made to some justice of the peace by the churchwardens or overseers of the parish from which the pauper is to be removed. Whether the complaint must be made to one of the justices who make the order, seems to be a matter of some doubt. The statute (1) in terms does not require it. And Gould J. in one case (2) says, that the statute directed, and the practice was to make a complaint to one justice, and he grants his warrant to bring the pauper before two justices, and then they two examine and remove.

Secondly, the act of the justices in making the order being a judicial act, they should be both together at the hearing and determining of the question. (3) If they were so present, it does not seem to be material that they should actually sign in the presence of each other.

Thirdly, they must be justices for the county, city, or borough, in which the complaining parish is situated. (4) They need not be justices strictly of the division in which the parish lies, for that part of the statute is only directory. (5)

Fourthly, except in removals from cities and boroughs, &c., which have one justice and but one of the *quorum*; (6) and except in removals from cities and boroughs, &c., where the number of the justices is limited, and where any one, two, or more of them are of the *quorum*; (7) except in these cases, one of the justices must be of the *quorum*. (8)

Fifthly, the party removed must have come to inhabit in the complaining parish. He must have come *animo morandi*. Or, if this proposition appear to be too broadly laid

(1) Stat. 13 and 14 Car. 2. c. 12.

(2) *Ware v. Stanstead Mount Fitchett*, 2 Salk. 488.

(3) *R. v. Wykes*, 2 Stra. 1092; *Ware v. Stanstead Mount Fitchett*, 2 Salk. 487; and see what is said by Lee C. J., and Page J., in *R. v. Coln St. Aldwin's*, Burr. s. c. 136; see also *R. v. Hamstall Ridware*, 3 T. R. 380., which, indeed, was the case of the allowance of a parish indenture; but the reasoning of the Court, and particularly of Buller J., applies with equal force to the case of an order of removal.

(4) See 15 Vin. Abr. 11 (D.2.) that no justice has jurisdiction out of his county.

(5) *Anon.* 2 Salk. 473.

(7) Stat. 4. Geo. 4. c. 17.

(6) Stat. 7 Geo. 3. c. 21.

(8) See 4 Burn's J. 758.

down, which perhaps it is, since a vagrant can be removed, at least such intention of taking up an abode in the parish must not be distinctly negatived by the circumstances of the case. In the case of a vagrant, it is not distinctly negatived. For how does it certainly appear that a vagrant has not such an intention? But if the ordinary business of a person, who has at the time an abode in another parish, has carried him into the parish of Q., and he there meets with an accident, he is not a proper object for removal. (1)

Sixthly, the party must, since the statute 35 Geo. 3. c. 101., be actually chargeable to the complaining parish.

Seventhly, as the same person cannot be both party to a suit and judge in it, an order is bad if one of the justices who make it is a churchwarden or overseer of the complaining parish. (2) The statute 16 Geo. 2. c. 18., which enacts that magistrates, who are rated inhabitants in the parish, shall be competent to act in matters relating to the settlement of the poor, does not go further than to permit them to act, although *virtual* parties, as all rated inhabitants must be, to the complaint of chargeability. But the parish officers are *acting* parties to the complaint. And that situation is incompatible with the character of a judge in the same case.

Next, as to the points which ought to appear upon the face of the order.

Of the matters which should appear upon the order.

First, a complaint must be set forth; for the complaint is the foundation of the justices' jurisdiction. (3)

Secondly, it must appear to be on the complaint of the churchwardens and overseers of the parish from which the pauper is removed. (4)

Thirdly, the complaint should be stated to have been made to a justice or to justices of the peace. An averment of a "complaint made to us," without reciting their authority as justices, is not sufficient. (5)

Fourthly, it must be stated, that the two justices who make the order are justices of the peace. Styling themselves *justices of the county* is not enough. (6)

(1) *R. v. St. James's*, in *Bury St. Edmund's*, 10 East, 25.; in *R. v. Birmingham*, 14 East, 251., the pauper's going into Q. parish was not casual. The overseers of J. parish took her to Q. for the purpose of obtaining relief. The overseers of Q. parish forbade her to go back to J. She did not go back to J., but *remained eight days in Q.*, and was then removed to a third parish.

(2) *R. v. Great Yarmouth*, 6 B. and C. 646.

(3) *R. v. Harely*, Andr. 361.; 4 Burn's J. 755.

(4) *Western Rivers v. St. Peter's*, 2 Salk. 492.

(5) *Walton v. Chesterfield*, 5 Mod. 322.

(6) *Q. v. Uplin*, 4 Burn's J. 756.

Fifthly, they must show themselves, by a sufficient averment, to be justices of the peace for the county. Calling themselves justices of the peace in the county is not sufficient; for by this it appears only that they live in the county. (1)

Sixthly, the county in which the complaining parish is situated, must, either by name, or by reference to it in the margin, appear in the order. (2) And the reason is said to be, because the appeal is to the justices of that county.

Seventhly, the order must set forth a complaint that the party removed came to inhabit in the complaining parish. (3)

Eighthly, before the statute 35 Geo. 3. c. 101., an order should have stated a complaint that the pauper was likely to become chargeable to the complaining parish. (4) Since that statute, an order must state a complaint of his being actually chargeable to that parish.

Ninthly, the adjudication, whatever words may be employed in it, must be to this effect; that the complaint is true. That is, it must, in some words or other, be adjudged that the pauper did come to inhabit in the complaining parish, and did become chargeable thereto. (5)

Tenthly, the adjudication must be limited by the complaint, and cannot exceed it. Thus, for instance, if the complaint stated be, that A. has come into the parish and is chargeable to it, the justices cannot remove any person but A. As to all others except A. it is a bad order. (6)

Eleventhly, the persons intended to be removed must be all individualized and sufficiently described. An order to remove a certain woman is bad. She should be either named or described as a person unknown. (7) And an order to remove a man and his family is bad as to all but the man. (8)

Twelfthly, the adjudication must clearly show the ground of removing every one of the individuals intended to be removed. If the justices adjudge the settlement of the man to be in Q., and send him, his wife, and child of one year old to Q.; this is a good order as to all. (9) For the wife

(1) *R. v. Owlton*, 2 Salk. 474.

(2) See 4 Burn's J. 759; *R. v. St. Stephenson*, 1 Barnard. 177, 196. &

(3) *Q. v. Graffham*, 4 Burn, 761.

(4) See 4 Burn, 762.; and see *R. v. Bourn*, Burr. s. c. 39.; and *R. v. Ustculm*, Burr. s. c. 138., that the chargeability must be adjudged, not at large, but expressly to the parish.

(5) *Suddlecomb v. Burwash*, 2 Salk. 491.; *R. v. Minchin Hampton*, 4 Burn, 769; *Q. v. Waltham Magna*, 4 Burn, 769.

(6) *R. v. Newington*, 4 Burn, 760.

(8) *Johnson's case*, 2 Salk. 485.

(7) *Southwell v. Needwell*, 4 Burn, 760.

(9) *Hobey v. Kingsbury*, 1 Stra. 527.

must follow the settlement of the husband, if he has a settlement; and a child of one year old will be presumed not to have acquired a distinct and independent settlement for itself. But if the order be to remove a child of the age of ten years to Q., because the settlement of the father is there, it is bad. For a child of this age may have gained a settlement in its own right. (1) The rule, therefore, is, that in removing a child above seven years of age to his father's settlement, or in removing a widow to her husband's settlement, there must be an express adjudication that the child or widow has gained no other settlement. (2) If the child is under seven years of age, it is sufficient to state his age without such adjudication; for in this case it appears, upon the face of the order, that he is of such tender years as not to have acquired a settlement for himself. (3) And with respect to a wife, removed without her husband, it is sufficient to adjudge that the place to which she is removed is the place of her lawful settlement, without a formal adjudication that the place to which she is removed is, or is not, the place of her husband's settlement. (4) The medium through which she became settled there need not be stated. (5)

Thirteenthly, the order must adjudge that the parish, to which the pauper is removed, is the place of his legal settlement, or last legal settlement. (6)

Fourteenthly, the order must, in express terms, command, warrant, or authorize the removal of the pauper to that parish. (7) But it does not appear to be necessary that such warrant should be directed to the overseers of the complaining parish. There is nothing in the statute to prevent such a warrant being directed to any other person. (8)

On any defect in any one of these essentials appearing, or being made to appear, and provided such defect vitiates the order *in toto*, it will not then be admitted as evidence against the parish, which is in a situation to raise any such objections. If the defect, which is made to appear, is such a defect as was mentioned in the tenth, eleventh, and twelfth divisions, (9) and has the effect of vitiating the order only in part, then the vitiated part only is to be shut out.

(1) *Reg. v. Middleham*, 4 Burn, 761.

(2) *Egburn v. Hartley-Wintley*, 4 Burn, 769.

(3) *R. v. Bowling, Burr.* s. c. 177.

(4) *R. v. Ysptyty*, 4 M. and S. 52.

(5) *Ibid.*

(6) *R. v. Westwood*, 1 Stra. 73.; *Berry v. Arundel*, 2 Salk. 479.; *St. Giles's, Cripple-gate v. Hackney*, 2 Salk. 478.

(7) Stat. 13 and 14 Car. 2. c. 12.

(8) And note, by statute 54 Geo. 3. c. 170. s. 10., the parish officers may employ any proper person to execute the order, and need not execute it themselves.

(9) Page 182.

The order, though a good one, may be shown to be abandoned by the parish in whose favour it was made

Even if the order produced be a good one, it is still open to the opposite party to get rid of it, by showing that it was abandoned by the parish in whose favour it was made. Which abandonment is usually signified by the parish which has removed the pauper, taking him back again without giving the other parish the trouble of appealing. (1) Upon proof of this abandonment by any witness acquainted with the circumstances, the evidence of the order must be rejected.

If none of these objections arise, then the order of removal may be put in and read. And nothing more is requisite, except some proof of identity. That is, it must be shown that the party stated in the order of removal, is the same party whose settlement is in question before the magistrates or the sessions.

Of the mode of proving a judgment of the sessions.

A judgment of the sessions may be proved either by the production of the original record from the office of the clerk of the peace, or by an examined copy of the record; the same proof of identity being given as before, in order to connect the subject matter of the judgment with the question that the justices have before them.

Of a certificate.

II. Another species of evidence, which may be employed for proving the settlement of a particular person to be in a particular parish, is that derived from a certificate.

Definition of a certificate.

A certificate has been already (2) defined to be an acknowledgment in writing, made by a parish, with certain forms and solemnities required by law, that the persons named or included in the writing have a settlement in the parish.

I have considered, in another place, the effect of a certificate in debarring the persons included in it from gaining a settlement in the parish for which the certificate was intended. (3)

But there is another effect of a certificate proper to be considered in this place; I mean its effect as affording evidence of a settlement in the parish which granted the certificate.

This effect flows from the statute 8 and 9 W. 3. c. 30., which enacts, that a certificate, being properly executed and allowed, shall oblige the parish which gives it to receive the persons included therein. So that here is an acknowledgment which is made to be binding upon the party from which it proceeds.

There are two rules which comprise the whole operation

(1) *R. v. Llanrhydd*, Burr. s. c. 658; *R. v. Diddleburgh*, 12 East, 359.

(2) Part I. p. 32.

(3) *Ibid.*

of a certificate in the way of evidence. These two rules I shall proceed to lay down, only premising, that when I speak of the certifying parish, I mean the parish which grants the certificate; when I speak of the certificated parish, I mean the parish which was in contemplation when the certificate was granted.

The first rule is, that whenever a question arises between the certifying and the certificated parish, respecting the settlement of the persons included in the certificate, the certificate is conclusive evidence, in favour of the certificated parish, that at the date of the certificate the settlement of those persons was in the certifying parish. (1)

In what cases
conclusive evi-
dence.

The second rule is, that whenever the same question arises between the certifying parish and a third parish, (2) or between the certificated parish and a third parish, (3) or between a third and fourth parish, (4) the certificate is evidence, but not conclusive evidence, to the same effect.

In what cases
not conclusive.

In the case of a dispute between the certifying parish and a third parish, the certificate has only the force of any other admission, which is, indeed, always evidence against the party who makes it, but not of such a binding nature as to debar that party from explaining a mistake and showing the truth of the matters in question.

In the other two cases it is also evidence that certain persons were, at a particular time, acknowledged by a particular parish to be their parishioners. Such evidence may induce the sessions to relieve the party producing it; but it cannot afford grounds for any decision which is to bind the certifying parish, for that parish is no party to the matter in dispute.

It only remains for me to show in what manner a certificate is to be proved; and to touch upon the objections which may be urged against its being received in evidence.

Of the manner
of proving a
certificate.

First, with respect to the manner of proving a certificate; by statute 3 Geo. 2. c. 29. s. 8., every certificate, whether made before the 24th of June, 1730, or since that day, may be received in evidence, without further proof than that all was done by two justices of the peace, which that act, or any former act, required them to do.

Now with respect to certificates given before the 24th June, 1730, it was required by the statute, 8 and 9 W. 3.

(1) *R. v. Buckingham*, 4 Burn, 627.

(2) As in *R. v. Lubbenham*, 4 T. R. 251., which case overrules *Honiton v. St. Mary Axe*, Salk. 535., and re-establishes the authority of *All-Saints v. St. Giles's*, Salk. 530.

(3) As in *R. v. Clifton*, 2 East, 168.

(4) As in *R. v. St. Margaret, Leicester*, 8 East, 332.

c. 30, that they should be allowed by two justices. In this case it was necessary, for a certain time after the passing of the statute 3 Geo. 2. c. 29., to prove the hand-writing of the two justices, and to give some evidence of their being justices of the peace. But such certificates, after a lapse of thirty years from their date, would require no such proof, their age and the fact of their being in the custody of the proper persons being all that would be required for their authentication. (1)

Our attention, therefore, may for the present be confined to certificates, not thirty years old, all of which must follow the direction of the statute 3 Geo. 2.

In offering such certificates in proof, it must be shown that the signatures to the allowance of the certificate and to the certifying of the oath required by the statute to be taken, are the signatures of the two justices, and that they were at the time justices of the peace.

And the same proof must be given in the case of a certificate, which is proved to be lost or destroyed; preceded of course by evidence of its destruction or loss, in order to let in secondary evidence of its contents. (2)

Upon such proof being given, the certificate will be evidence in one or other of the ways mentioned in the two rules already laid down; (3) unless some informality appear upon the face of the certificate, or some irregularity is proved to have taken place in the making of it.

Who may take advantage of defects in a certificate.

It seems to be quite clear that the certifying parish may take advantage of any defect or informality in the certificate granted by its own officers. (4) And for this reason, that the power given to certify being an authority to the parish officers by a discretionary act of their own to bind the parish, the parish should not be bound by that act unless the power or authority has been strictly pursued. (5)

If the certifying parish can object to the validity of the certificate, no doubt any other parish may impugn it. As therefore the objections may be made, between whatever parties the question may arise, it only remains to be shown what those objections are which will prove fatal to its validity.

Of the forms required for

In order to understand this, it will be necessary to recapitulate the forms required for the making of a due certificate,

(1) See page 111.

(2) See page 113.

(3) Page 185.

(4) In *R. v. Catesby*, 2 B. and C. 814., the objection was made by the certifying, and against the certificated, parish.

(5) This is the reasoning of *Grose J.*, in *R. v. Clifton*, 2 East, 174.

and the character and number of the persons, whose sanction and authority are to give it effect. the making of a certificate.

1. The certificate should be under the hands and seals of the churchwardens and overseers of the poor, or the major part of them. (1) In places where there are no churchwardens, the certificate should be under the hands and seals of the overseers. (2) Now as the statute mentions churchwardens and overseers, it was held that a certificate signed by two persons only, who were the churchwardens, and one of whom was also overseer of the poor, did not satisfy the terms of the statute; to do which it should have been signed by distinct persons as churchwardens, and distinct persons as overseers. (3)

In consequence of this decision, and of another of the same kind, (4) it was, by the statute 51 Geo. 3. c. 80. s. 1., enacted that certificates, signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as of overseers of the poor, should be considered as valid and effectual as if they were signed by distinct persons as churchwardens, and distinct persons as overseers. And this statute was afterwards construed to extend to a case where *one* only of the officers acted in a double capacity. (5)

Where a certificate is given by a township or hamlet, &c., maintaining its own poor, it frequently happens that the certificate is executed by the churchwardens of the parish in which the township, &c., is situated, who indeed act as churchwardens or chapel-wardens for the township &c., but have not been appointed to that office. The statute 54 Geo. 3. c. 107, makes the signature of such person valid, provided they have been sworn into the office of churchwarden of the whole parish, or into the office of churchwarden or chapelwarden of the township &c.

The same statute in section 2.. gives to the actual overseers and churchwardens or chapel-wardens, acting or appointed for the smaller district, the power of executing certificates within that district.

The major part of the churchwardens and overseers means the major part of the aggregate body of churchwardens and overseers, and not the majority of each of those classes. (6) It seems to be doubtful whether these parish officers must be

(1) Stat. 8 and 9 W. 3. c. 30. (2) *Ibid.*
 (3) R. v. St. Margaret's Leicester, 8 East, 332.
 (4) R. v. All Saints, Derby, 13 East, 143.
 (5) R. v. St. Margaret, Leicester, 2 B. and A. 200.
 (6) See Part I. p. 45.

strictly officers *de jure*, or whether by merely being officers *de facto* they are sufficiently authorized to execute certificates. (1) If they are not sworn into their office, they are not officers *de jure*. To make them so, the court will, in the case of old certificates at least, presume that the usual oath was taken at the usual time of taking it. (2).

In some parishes or townships, where there were originally two churchwardens or chapel-wardens, it had become the practice to elect but one churchwarden or chapel-warden. Now, as certificates signed by this single officer in a parish, where the custom to elect a single officer might be proved not to exist, and whose election indeed was altogether void; (3) as such certificates, I say, were clearly bad; in order to prevent their being litigated and set aside, it was by stat. 1 and 2 Geo. 4. c. 32., enacted, that all certificates, which had been executed in this way before the 28th of May 1821, should be deemed and taken to be as valid as if executed by one or more churchwardens or chapel-wardens legally appointed.

If any certificate has been executed in this way since the 28th May 1821, it is of course as invalid as if the statute had never passed.

II. The execution of the parish officers is to be attested by two or more credible witnesses. And here it may be noticed that it has been decided that the justices, who allow the certificate, may also attest as witnesses; but it must appear upon the certificate, that they take upon them to act in both capacities. (4)

III. Since the statute 3 Geo. 2. c. 29., the witnesses, or one of them, must make oath that such witness or witnesses saw the execution of the certificate by the parish officers, and that the names of the witnesses are of their own proper hand-writing.

IV. Before the passing of the last-mentioned statute, (5) the certificate was to be allowed by two Justices of the peace for the county, city, liberty, or borough, in which the certifying parish is situated. But now the two justices have not only to allow the certificate, but also to certify that the oath, mentioned in the last division, was taken before them.

How a certifi- These being the principal requisites to make a good cer-

(1) See what is said by Bayley J., and Littledale J., in *R. v. Whitchurch*, 1 Man. and R. 480, 481. See also *R. v. Wymondham*, 6 T. R. 553.

(2) *R. v. Whitchurch*, 1 Man. and R. 472.

(3) See on this subject what is said by Holroyd J. in *R. v. Catesby*, 2 B. and C. 819.

(4) *Horncastle v. Boston*, 1 Stra. 94.

(5) 3 Geo. 2. c. 29.

tificate, where any one of them is wanting, the certificate may be successfully impeached. cate may be impeached.

Thus if, in the case of a certificate by a *parish*, it be proved that it was not executed by the major part of the churchwardens and overseers:

If, in the case of a certificate by a *township &c.* which has no churchwardens, it be proved that it was not signed by the overseers:

If, in the case of a certificate given by a *parish* or *township, &c.* since the 28th May, 1821, and signed by one churchwarden only, it be proved that one only was appointed, and that there was no custom for such an appointment:

If the execution of the parish officers appear not to be attested by two witnesses at least, or if it be proved that ~~in~~ point of fact it was not so attested:

If, in a certificate made since the stat. 3 Geo. 2. c. 29, it does not appear that the justices certified the oath required by that statute, or if it is proved that no such oath was taken:

If the certificate does not appear to have been allowed by two justices, or if it be shown, as it must, by the party impeaching it when it is thirty years old, that in point of fact it was not allowed by two justices:

On any of these matters appearing, or being made to appear by matter of evidence, as the case may be, the certificate will be null and void, and the settlement, which was to depend on it, must fall to the ground.

III. Another species of evidence, by means of which the settlement of a particular person may be proved to be in a particular parish, is afforded by the relief which that person may have received from the parish at a time when he was residing out of it. III. Of the proof of a settlement by the granting of relief.

The giving of such relief is an acknowledgment by the parish, that the pauper is their parishioner. And proof of such relief, though given only once, is sufficient ground, in the absence of all other circumstances, for presuming a settlement in the parish which thus affords relief. (1)

But relief, to be evidence at all, must be afforded to the pauper while living *out* of the parish. (2) For it may be given to persons living in the parish, in the character of casual poor. And however frequently such relief may have been given, it is better, upon grounds of humanity and policy, that it should not be received at all as evidence To be evidence at all, relief must be given to the party when living out of the parish.

(1) *R. v. Wakefield*, 5 East, 335; *R. v. Stanley cum Wrenthorpe*, 15 East, 350.

(2) *R. v. Chadderton*, 2 East, 27; *R. v. Chatham*, 8 East, 498.

against the parish. For if the parish officers, by giving relief to a pauper, were to be making evidence against themselves as to his settlement in their parish, it would make them perform their duty to casual poor with great reluctance. (1)

How to be
proved.

As to the mode of proving such relief, it is a fact which may be proved by the pauper himself; or by any person who saw a payment made by one of the overseers to the pauper, or to any one on the pauper's behalf; or by the overseer himself, if his parish is not a party; or, if the parish which gave relief be a party, it may be proved by the admission of the overseer or even of any rated inhabitant whatever, whose declarations are, in all matters relating to settlement, admissible evidence, (2) whatever weight they may be thought entitled to by the Court, which has to determine such questions. (3) Or, lastly, relief may be proved, against the parish which afforded relief, by giving notice to produce, and by the production of, any book which contains an entry to that effect.

CHAP. X.

Of certain Exceptions to the General Rules of Evidence.

THERE are, in settlement cases, three exceptions to the general rules of evidence. These have been introduced at different times by different statutes, for the purpose either of removing certain supposed impediments to the discovery of truth, or of facilitating the proper execution of the poor laws.

1. Interested
witnesses are
by stat. 54 Geo.
3. c. 170. s. 9,
rendered com-
petent.

1. The facts relating to a settlement might be known only to persons, who were incompetent from interest to give evidence in the case. To obviate this inconvenience, the stat. 54 Geo. 3. c. 170. s. 9, enacted that no inhabitant or person rated, or liable to be rated, or wholly or in part supported out of the rates, or holding or executing any office in the parish, shall be, by reason thereof, deemed to be an incompetent witness for or against the parish in any matter relat-

(1) By Lord Ellenborough, in *R. v. Chatham*, 8 East, 501. See, however, what is said by Bayley J., in *R. v. Trowbridge*, 7 B. and C. 255.

(2) *Rex v. Hardwicke*, 11 East, 578; *Rex v. Whitley Lower*, 1 M. and S. 638.

(3) See *Rex v. Hardwicke*, and *Rex v. Whitley Lower*, 1 Burn, 794, 5.

ing to the rates, or to the boundary, or to any order of removal, or the settlement of any pauper in the parish. Under this statute, therefore, all objections on the score of incompetency in any witness, as an interested witness, are wholly removed.

11. It is a general rule, and applicable to settlement cases as well as all others, that no *ex parte* statement can be admitted in evidence against one who has had no opportunity of cross-examining the person from whom such statement proceeds. (1) This rule was thought to be attended with great inconveniences in the case of a soldier, who is more liable to sudden and unforeseen accidents than ordinary subjects of the realm. In order to prevent these inconveniences, and with a view to perpetuate the testimony of soldiers, on whose settlement a question may arise, power is given, by the different Mutiny Acts, (2) under particular circumstances, to justices of the peace, to take the examination of non-commissioned officers and soldiers, and to make it evidence as to their settlement, whenever it may come into dispute.

11. A soldier's examination under the mutiny acts.

Such examination may be taken by a single justice of peace. But in order to give him jurisdiction, the following circumstances must concur :

Examination by whom and how, and under what circumstances to be taken.

First, the non-commissioned officer or soldier must be quartered in some place for which the justice who takes the examination is a justice of the peace.

Secondly, he must have, at the time, either a wife or child.

Thirdly, the examination must be taken in the town or place where the non-commissioned officer or soldier is quartered.

And as all persons having a special authority under acts of Parliament, must show their authority upon the face of the order or other document which they are thus empowered to execute or effect, it seems to be necessary that these matters, which give the justice jurisdiction, should be stated in the examination itself.

All the circumstances should be stated in the examination itself.

Either this examination, or an attested copy of it given by the magistrate to the soldier, and by him delivered to his commanding officer, may be produced in evidence as to the settlement of the soldier, although he be dead or absent from the kingdom. (3)

(1) See *R. v. Nuneham Courtney*, 1 East, 373 ; *R. v. Ferry Frystone*, 2 East, 54.

(2) See Stat. 7 and 8 Geo. 4. cap. 4. sect. 72.

(3) See stat. 7 and 8 Geo. 4. c. 4. s. 72 ; *R. v. Warminster*, 3 B. and A. 321.

Requisites to
make the
examination
evidence.

The requisites to make such an examination evidence, are the following :

First, the document tendered in proof must be either the original examination itself, (1) or the attested copy of it. No other copy can be admitted. (2)

Secondly, some proof must be given for the purpose of showing that the person whose settlement is the subject of inquiry was the person whose examination is produced.

Thirdly, it was said in a late case, (3) by Mr. Justice Bayley, that the fact of the party's being a soldier (and, of course, all the other facts) must be proved *aliunde*, and cannot be taken from the examination itself. And he instanced the case of the Banbury Peerage, where depositions by persons, stating themselves to be servants in the family, were produced, and it was held by the judges, that extrinsic independent proof must be given of the situation which they filled. It may, perhaps, be doubted whether the two cases are strictly parallel. For in the deposition the statement is an unauthorized and unconfirmed assertion, proceeding from the lips of the individual. In the examination, it is under the hand of a person who was at the time performing a species of judicial act, who was in a situation to investigate, and who must be supposed to have investigated the truth of those facts upon which his jurisdiction was founded.

In the case to which I have alluded, (4) it was not stated in the examination itself that the soldier was a soldier *in quarters*. Mr. Justice Bayley seemed to think that this defect might be supplied by extrinsic evidence. But Mr. Justice Holroyd rested his judgment wholly upon the ground of the jurisdiction of the justice not being set forth.

Original examination, how proved.

Lastly, with regard to the authentication of the document, a different mode of proof will be required with respect to the original examination from that required for the attested copy.

The original examination must be proved to be in the hand-writing of the justice; or, if not in his own hand-writing, to have been signed by him.

Attested copy, how proved.

With regard to the attested copy that must be proved to have come out of the custody of the commanding officer, to whom the Mutiny Act directs it to be delivered. And, in order to prove it to be a correct copy of the original, the

(1) *R. v. Warley*, 6 T. R. 534.

(2) *R. v. Clayton-le-Moors*, 5 T. R. 714.

(3) *R. v. All Saints*, Sittings in Banc. after Hilary Term, 1828.

(4) *R. v. All Saints*, see note (3).

witness who attested it should, perhaps, be brought forward, or evidence of his hand-writing should be given if he himself cannot be produced. And the hand-writing of the magistrate must certainly be proved. (1)

III. An exception to the rules of evidence has also been made in the case of a prisoner in a gaol or house of correction, or person who is in the custody of any constable or other peace officer by virtue of any warrant or commitment. (2) In this case, if such prisoner or person has a wife or child, a justice of the peace may take his examination in writing. And this examination, being signed by the justice taking it, is to be received in evidence as to his settlement; but with two limitations, that it is only to be so admitted for the purpose of any order of removal; and that it is evidence so long only as the person continues a prisoner.

III. The examination of a prisoner in gaol.

(1) *R. v. Bilton*, 1 East, 13.

(2) Stat. 59 Geo. 3. c. 12. s. 26.

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